CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

Decisions, Rulings, Regulations, Notices, and Abstracts

Concerning Customs and Related Matters of the

U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

VOL. 36 MARCH 20, 2002 NO. 12

This issue contains:

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

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U.S. Customs Service

Treasury Decisions

(T.D. 02–10)

FOREIGN CURRENCIES

VARIANCES FROM QUARTERLY RATES FOR FEBRUARY 2002

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, and reflect variances of 5 per centum or more from the quarterly rates published in the CUSTOMS BULLETIN of February 20, 2002, page sixteen for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Holiday(s): February 18, 2002.

Brazil real:

February 6, 2002	$0.411523
February 7, 2002	.407166
February 8, 2002	.405581
February 9, 2002	.405581
February 10, 2002	.405581
February 11, 2002	.406835
February 12, 2002	.407000
February 14, 2002	.411946
February 15, 2002	.410846
February 16, 2002	.410846
February 17, 2002	.410846
February 18, 2002	.410846
February 19, 2002	.412116
February 20, 2002	.411862

South Africa rand:

February 1, 2002	$0.085616
February 2, 2002	.085616
February 3, 2002	.085616
February 4, 2002	.085948
February 5, 2002	.085985
February 6, 2002	.087108
February 7, 2002	.087489
February 8, 2002	.087108
February 9, 2002	.087108
February 10, 2002	.087108

FOREIGN CURRENCIES—Variances from quarterly rates for February 2002 (continued):

South Africa rand (continued):

February 11, 2002	$0.086356
February 12, 2002	.087489
February 13, 2002	.086730
February 14, 2002	.086468
February 15, 2002	.087336
February 16, 2002	.087336
February 17, 2002	.087336
February 18, 2002	.087336
February 19, 2002	.086843
February 20, 2002	.087642
February 21, 2002	.087413
February 22, 2002	.087413
February 23, 2002	.087413
February 24, 2002	.087413
February 25, 2002	.087146
February 26, 2002	.087681
February 27, 2002	.087773
February 28, 2002	.088028

Venezuela bolivar:

February 13, 2002	$0.001004
February 14, 2002	.001175
February 15, 2002	.001122
February 16, 2002	.001122
February 17, 2002	.001122
February 18, 2002	.001122
February 19, 2002	.001071
February 20, 2002	.001047
February 21, 2002	.001018
February 22, 2002	.000932
February 23, 2002	.000932
February 24, 2002	.000932
February 25, 2002	.000921
February 26, 2002	.001007
February 27, 2002	.000949
February 28, 2002	.000984

Dated: March 1, 2002.

RICHARD B. LAMAN,
Chief,
Customs Information Exchange.

(T.D. 02–11)

FOREIGN CURRENCIES

DAILY RATES FOR COUNTRIES NOT ON QUARTERLY LIST FOR FEBRUARY 2002

The Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Holiday(s): February 18, 2002.

Austria schilling:

February 1, 2002	$0.062593
February 2, 2002	.062593
February 3, 2002	.062593
February 4, 2002	.063116
February 5, 2002	.063022
February 6, 2002	.063174
February 7, 2002	.063080
February 8, 2002	.063422
February 9, 2002	.063422
February 10, 2002	.063422
February 11, 2002	.063792
February 12, 2002	.063720
February 13, 2002	.063443
February 14, 2002	.063320
February 15, 2002	.063443
February 16, 2002	.063443
February 17, 2002	.063443
February 18, 2002	.063443
February 19, 2002	.063690
February 20, 2002	.063262
February 21, 2002	.063313
February 22, 2002	.063640
February 23, 2002	.063640
February 24, 2002	.063640
February 25, 2002	.063320
February 26, 2002	.063095
February 27, 2002	.062804
February 28, 2002	.062920

Belgium franc:

February 1, 2002	$0.021351
February 2, 2002	.021351
February 3, 2002	.021351
February 4, 2002	.021530
February 5, 2002	.021497
February 6, 2002	.021549
February 7, 2002	.021517
February 8, 2002	.021634
February 9, 2002	.021634
February 10, 2002	.021634
February 11, 2002	.021760

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for February 2002 (continued):

Belgium franc (continued):

February 12, 2002	$0.021735
February 13, 2002	.021641
February 14, 2002	.021599
February 15, 2002	.021641
February 16, 2002	.021641
February 17, 2002	.021641
February 18, 2002	.021641
February 19, 2002	.021725
February 20, 2002	.021579
February 21, 2002	.021596
February 22, 2002	.021708
February 23, 2002	.021708
February 24, 2002	.021708
February 25, 2002	.021599
February 26, 2002	.021522
February 27, 2002	.021423
February 28, 2002	.021463

Finland markka:

February 1, 2002	$0.144860
February 2, 2002	.144860
February 3, 2002	.144860
February 4, 2002	.146071
February 5, 2002	.145853
February 6, 2002	.146206
February 7, 2002	.145987
February 8, 2002	.146778
February 9, 2002	.146778
February 10, 2002	.146778
February 11, 2002	.147635
February 12, 2002	.147467
February 13, 2002	.146828
February 14, 2002	.146542
February 15, 2002	.146828
February 16, 2002	.146828
February 17, 2002	.146828
February 18, 2002	.146828
February 19, 2002	.147400
February 20, 2002	.146408
February 21, 2002	.146525
February 22, 2002	.147282
February 23, 2002	.147282
February 24, 2002	.147282
February 25, 2002	.146542
February 26, 2002	.146021
February 27, 2002	.145348
February 28, 2002	.145617

France franc:

February 1, 2002	$0.131304
February 2, 2002	.131304
February 3, 2002	.131304
February 4, 2002	.132402
February 5, 2002	.132204
February 6, 2002	.132524
February 7, 2002	.132326

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for February 2002 (continued):

France franc (continued):

February 8, 2002	$0.133042
February 9, 2002	.133042
February 10, 2002	.133042
February 11, 2002	.133820
February 12, 2002	.133667
February 13, 2002	.133088
February 14, 2002	.132829
February 15, 2002	.133088
February 16, 2002	.133088
February 17, 2002	.133088
February 18, 2002	.133088
February 19, 2002	.133606
February 20, 2002	.132707
February 21, 2002	.132814
February 22, 2002	.133500
February 23, 2002	.133500
February 24, 2002	.133500
February 25, 2002	.132829
February 26, 2002	.132356
February 27, 2002	.131746
February 28, 2002	.131990

Germany deutsche mark:

February 1, 2002	$0.440376
February 2, 2002	.440376
February 3, 2002	.440376
February 4, 2002	.444057
February 5, 2002	.443392
February 6, 2002	.444466
February 7, 2002	.443801
February 8, 2002	.446204
February 9, 2002	.446204
February 10, 2002	.446204
February 11, 2002	.448812
February 12, 2002	.448301
February 13, 2002	.446358
February 14, 2002	.445489
February 15, 2002	.446358
February 16, 2002	.446358
February 17, 2002	.446358
February 18, 2002	.446358
February 19, 2002	.448096
February 20, 2002	.445080
February 21, 2002	.445437
February 22, 2002	.447738
February 23, 2002	.447738
February 24, 2002	.447738
February 25, 2002	.445489
February 26, 2002	.443904
February 27, 2002	.441858
February 28, 2002	.442677

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for February 2002 (continued):

Greece drachma:

February 1, 2002	$0.002528
February 2, 2002	.002528
February 3, 2002	.002528
February 4, 2002	.002549
February 5, 2002	.002545
February 6, 2002	.002551
February 7, 2002	.002547
February 8, 2002	.002561
February 9, 2002	.002561
February 10, 2002	.002561
February 11, 2002	.002576
February 12, 2002	.002573
February 13, 2002	.002562
February 14, 2002	.002557
February 15, 2002	.002562
February 16, 2002	.002562
February 17, 2002	.002562
February 18, 2002	.002562
February 19, 2002	.002572
February 20, 2002	.002555
February 21, 2002	.002557
February 22, 2002	.002570
February 23, 2002	.002570
February 24, 2002	.002570
February 25, 2002	.002557
February 26, 2002	.002548
February 27, 2002	.002536
February 28, 2002	.002541

Ireland pound:

February 1, 2002	$1.093625
February 2, 2002	1.093625
February 3, 2002	1.093625
February 4, 2002	1.102768
February 5, 2002	1.101117
February 6, 2002	1.103783
February 7, 2002	1.102133
February 8, 2002	1.108100
February 9, 2002	1.108100
February 10, 2002	1.108100
February 11, 2002	1.114576
February 12, 2002	1.113306
February 13, 2002	1.108481
February 14, 2002	1.106323
February 15, 2002	1.108481
February 16, 2002	1.108481
February 17, 2002	1.108481
February 18, 2002	1.108481
February 19, 2002	1.112798
February 20, 2002	1.105307
February 21, 2002	1.106196
February 22, 2002	1.111910
February 23, 2002	1.111910
February 24, 2002	1.111910

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for February 2002 (continued):

Ireland pound (continued):	
February 25, 2002	$1.106323
February 26, 2002	1.102387
February 27, 2002	1.097308
February 28, 2002	1.099339
Italy lira:	
February 1, 2002	$0.000445
February 2, 2002	.000445
February 3, 2002	.000445
February 4, 2002	.000449
February 5, 2002	.000448
February 6, 2002	.000449
February 7, 2002	.000448
February 8, 2002	.000451
February 9, 2002	.000451
February 10, 2002	.000451
February 11, 2002	.000453
February 12, 2002	.000453
February 13, 2002	.000451
February 14, 2002	.000450
February 15, 2002	.000451
February 16, 2002	.000451
February 17, 2002	.000451
February 18, 2002	.000451
February 19, 2002	.000453
February 20, 2002	.000450
February 21, 2002	.000450
February 22, 2002	.000452
February 23, 2002	.000452
February 24, 2002	.000452
February 25, 2002	.000450
February 26, 2002	.000448
February 27, 2002	.000446
February 28, 2002	.000447
Luxembourg franc:	
February 1, 2002	$0.021351
February 2, 2002	.021351
February 3, 2002	.021351
February 4, 2002	.021530
February 5, 2002	.021497
February 6, 2002	.021549
February 7, 2002	.021517
February 8, 2002	.021634
February 9, 2002	.021634
February 10, 2002	.021634
February 11, 2002	.021760
February 12, 2002	.021735
February 13, 2002	.021641
February 14, 2002	.021599
February 15, 2002	.021641
February 16, 2002	.021641
February 17, 2002	.021641
February 18, 2002	.021641
February 19, 2002	.021725
February 20, 2002	.021579

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for February 2002 (continued):

Luxembourg franc (continued):

February 21, 2002	$0.021596
February 22, 2002	.021708
February 23, 2002	.021708
February 24, 2002	.021708
February 25, 2002	.021599
February 26, 2002	.021522
February 27, 2002	.021423
February 28, 2002	.021463

Netherlands guilder:

February 1, 2002	$0.390841
February 2, 2002	.390841
February 3, 2002	.390841
February 4, 2002	.394108
February 5, 2002	.393518
February 6, 2002	.394471
February 7, 2002	.393881
February 8, 2002	.396014
February 9, 2002	.396014
February 10, 2002	.396014
February 11, 2002	.398328
February 12, 2002	.397874
February 13, 2002	.396150
February 14, 2002	.395379
February 15, 2002	.396150
February 16, 2002	.396150
February 17, 2002	.396150
February 18, 2002	.396150
February 19, 2002	.397693
February 20, 2002	.395016
February 21, 2002	.395333
February 22, 2002	.397375
February 23, 2002	.397375
February 24, 2002	.397375
February 25, 2002	.395379
February 26, 2002	.393972
February 27, 2002	.392157
February 28, 2002	.392883

Portugal escudo:

February 1, 2002	$0.004296
February 2, 2002	.004296
February 3, 2002	.004296
February 4, 2002	.004332
February 5, 2002	.004326
February 6, 2002	.004336
February 7, 2002	.004330
February 8, 2002	.004353
February 9, 2002	.004353
February 10, 2002	.004353
February 11, 2002	.004378
February 12, 2002	.004373
February 13, 2002	.004355
February 14, 2002	.004346
February 15, 2002	.004355
February 16, 2002	.004355

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for February 2002 (continued):

Portugal escudo (continued):

February 17, 2002	$0.004355
February 18, 2002	.004355
February 19, 2002	.004371
February 20, 2002	.004342
February 21, 2002	.004346
February 22, 2002	.004368
February 23, 2002	.004368
February 24, 2002	.004368
February 25, 2002	.004346
February 26, 2002	.004331
February 27, 2002	.004311
February 28, 2002	.004319

South Korea won:

February 1, 2002	$0.000759
February 2, 2002	.000759
February 3, 2002	.000759
February 4, 2002	.000756
February 5, 2002	.000759
February 6, 2002	.000759
February 7, 2002	.000759
February 8, 2002	.000757
February 9, 2002	.000757
February 10, 2002	.000757
February 11, 2002	.000757
February 12, 2002	.000757
February 13, 2002	.000755
February 14, 2002	.000760
February 15, 2002	.000760
February 16, 2002	.000760
February 17, 2002	.000760
February 18, 2002	.000760
February 19, 2002	.000757
February 20, 2002	.000758
February 21, 2002	.000758
February 22, 2002	.000756
February 23, 2002	.000756
February 24, 2002	.000756
February 25, 2002	.000755
February 26, 2002	.000754
February 27, 2002	.000753
February 28, 2002	.000755

Spain peseta:

February 1, 2002	$0.005177
February 2, 2002	.005177
February 3, 2002	.005177
February 4, 2002	.005220
February 5, 2002	.005212
February 6, 2002	.005225
February 7, 2002	.005217
February 8, 2002	.005245
February 9, 2002	.005245
February 10, 2002	.005245
February 11, 2002	.005276
February 12, 2002	.005270

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for February 2002 (continued):

Spain peseta (continued):

February 13, 2002	$0.005247
February 14, 2002	.005237
February 15, 2002	.005247
February 16, 2002	.005247
February 17, 2002	.005247
February 18, 2002	.005247
February 19, 2002	.005267
February 20, 2002	.005232
February 21, 2002	.005236
February 22, 2002	.005263
February 23, 2002	.005263
February 24, 2002	.005263
February 25, 2002	.005237
February 26, 2002	.005218
February 27, 2002	.005194
February 28, 2002	.005204

Taiwan N.T. dollar:

February 1, 2002	$0.028571
February 2, 2002	.028571
February 3, 2002	.028571
February 4, 2002	.028531
February 5, 2002	.028580
February 6, 2002	.028555
February 7, 2002	.028547
February 8, 2002	.028506
February 9, 2002	.028506
February 10, 2002	.028506
February 11, 2002	.028506
February 12, 2002	.028506
February 13, 2002	.028506
February 14, 2002	.028506
February 15, 2002	.028490
February 16, 2002	.028490
February 17, 2002	.028490
February 18, 2002	.028490
February 19, 2002	.028490
February 20, 2002	.028490
February 21, 2002	.028490
February 22, 2002	.028490
February 23, 2002	.028490
February 24, 2002	.028490
February 25, 2002	.028498
February 26, 2002	.028498
February 27, 2002	.028482
February 28, 2002	.028482

Dated: March 1, 2002.

RICHARD B. LAMAN,
Chief,
Customs Information Exchange.

U.S. Customs Service

General Notices

NOTICE OF REVOCATION OF CUSTOMS BROKER LICENSE

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: General notice.

SUMMARY: Pursuant to section 641 of the Tariff Act of 1930 as amended (19 USC 1641) and the Customs Regulations [19 CFR 111.45(a)], the following Customs broker license is revoked by operation of law.

Name	*License*	*Port*
Dimerco Express (USA) Corporation	13620	San Francisco

Dated: March 4, 2002.

BONNI G. TISCHLER,
Assistant Commissioner,
Office of Field Operations.

[Published in the Federal Register, March 8, 2002 (67 FR 10803)]

RECEIPT OF AN APPLICATION FOR "LEVER-RULE" PROTECTION

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of receipt of application for "Lever-Rule" protection.

SUMMARY: Pursuant to 19 CFR 133.2(f), this notice advises interested parties that Customs has received an application from McCormick Delaware, Inc. seeking "Lever-Rule" protection.

FOR FURTHER INFORMATION CONTACT: Paul Pizzeck, Esq., Intellectual Property Rights Branch, Office of Regulations & Rulings, (202) 927–1754.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to 19 CFR 133.2(f), this notice advises interested parties that Customs has received an application from McCormick Delaware, Inc. seeking "Lever-Rule" protection. Protection is sought against importations of the following products intended for sale in Mexico:

1) "MAYONESA" mayonnaise with lime juice which bears the following trademarks: MC & DESIGN (U.S. Patent & Trademark Office Registration No. 2,223,933; U.S. Customs Recordation No. TMK 01–00488) and MCCORMICK (U.S. Patent & Trademark Office Registration No. 2,233,809; U.S. Customs Recordation No. TMK 01–00491).

2) "MERMELADA" strawberry fruit spread which bears the following trademarks: MC & DESIGN (U.S. Patent & Trademark Office Registration No. 2,223,933; U.S. Customs Recordation No. TMK 01–00488) and MCCORMICK (U.S. Patent & Trademark Office Registration No. 2,233,809; U.S. Customs Recordation No. TMK 01–00491).

Pursuant to 19 CFR 133.2(f), Customs will publish an additional notice in the CUSTOMS BULLETIN indicating which, if any, trademark(s) will receive Lever-rule protection relative to specific products in the event that Customs determines that the subject mayonnaise and/or fruit spread are physically and materially different from the products authorized for sale in the U.S.

Dated: March 1, 2002.

JOANNE ROMAN STUMP,
Chief, Intellectual Property Rights Branch,
Office of Regulations and Rulings.

DATES AND DRAFT AGENDA OF THE TWENTY-FIFTH SESSION OF THE HARMONIZED SYSTEM REVIEW SUBCOMMITTEE OF THE WORLD CUSTOMS ORGANIZATION

AGENCIES: U.S. Customs Service (Department of the Treasury) and U.S. International Trade Commission.

ACTION: Publication of the dates and draft agenda for the twenty-fifth session of the Harmonized System Review Subcommittee of the World Customs Organization.

SUMMARY: This notice sets forth the dates and draft agenda for the next session of the Harmonized System Review Subcommittee of the World Customs Organization.

DATE: February 28, 2002.

FOR FURTHER INFORMATION CONTACT: Myles B. Harmon, Director, International Agreements Staff, Office of Regulations & Rulings, U.S. Customs Service (tel: 202–927–2255 & fax: 202–927–1873), or Eugene A. Rosengarden, Director, Office of Tariff Affairs and Trade Agreements, U.S. International Trade Commission (tel: 202–205–2592 & fax: 202–205–2616).

SUPPLEMENTARY INFORMATION:

BACKGROUND

The United States is a contracting party to the International Convention on the Harmonized Commodity Description and Coding System ("Harmonized System Convention"). The Harmonized Commodity Description and Coding System ("Harmonized System"), an international nomenclature system, forms the core of the U.S. tariff, the Harmonized Tariff Schedule of the United States. The Harmonized System Convention is under the jurisdiction of the World Customs Organization (established as the Customs Cooperation Council).

Article 6 of the Harmonized System Convention establishes a Harmonized System Committee ("HSC"). The HSC is composed of representatives from each of the contracting parties to the Harmonized System Convention. The HSC's responsibilities include issuing classification decisions on the interpretation of the Harmonized System. Those decisions may take the form of published tariff classification opinions concerning the classification of an article under the Harmonized System or amendments to the Explanatory Notes to the Harmonized System. The HSC also considers amendments to the legal text of the Harmonized System. The HSC meets twice a year in Brussels, Belgium.

In order to ensure that the Harmonized System continues to remain current, the Harmonized System Review Subcommittee ("RSC") was created as a subcommittee of the HSC. The RSC is responsible for periodically reviewing the Harmonized System and proposing amendments to the legal text that reflect changes in technology and in patterns of in-

ternational trade. The RSC is composed of the same representatives as the HSC. As with the HSC, the RSC meets twice a year in Brussels, Belgium. The next session of the RSC will be the twenty-fifth, and it will be held from March 18 to 22, 2002.

In accordance with section 1210 of the Omnibus Trade and Competitiveness Act of 1988 (Pub. L. 100–418), the Department of the Treasury, represented by the U.S. Customs Service, the Department of Commerce, represented by the Census Bureau, and the U.S. International Trade Commission ("ITC"), jointly represent the U.S. government at the sessions of the HSC. The ITC representative serves as the head of the delegation at the sessions of the RSC.

Set forth below is the draft agenda for the next session of the RSC. Copies of available agenda-item documents may be obtained from either the Customs Service or the ITC. Comments on agenda items may be directed to the above-listed individuals.

MYLES B. HARMON,
Director, International Agreements Staff,
Office of Regulations & Rulings.

[Attachment]

Attachment

DRAFT AGENDA FOR THE TWENTY-FIFTH SESSION OF THE HARMONIZED SYSTEM REVIEW SUB-COMMITTEE

Monday, March 18 (10 am.) to Friday, March 22, 2002

I.

ADOPTION OF THE AGENDA

1. Draft Agenda	NR0206E2
2. Draft Timetable	NR0207E1

II.

GENERAL QUESTIONS

1. Approval of Review Sub-Committee Reports	NR0208E1
2. Report on the meeting of the Policy Commission (46th Session)	NR0209E1
3. Decisions taken by the Harmonized System Committee at its 28th Session affecting the work of the Review Sub-Committee	NR0210E1

III.

TECHNICAL QUESTIONS

A. FURTHER STUDIES

1. Possible amendments to the Nomenclature regarding the classification of waffles	NR0211E1
2. Possible amendments to the Nomenclature regarding the classification of sauces	NR0169E1 NR0198E1 (RSC/24) NR0212E1
3. Possible amendments to the Nomenclature and the Explanatory Note to heading 84.42	NR0213E1
4. Possible amendments to the Nomenclature regarding the classification of cameras	**NR0173E1** **(RSC/24)** NR0214E1 **NR0259E1** **NR0260E1**
5. Possible amendments to the Nomenclature and Explanatory Notes to Chapter 24	NR0174E1 NR0197E1 (RSC/24) NR0215E1
6. Possible amendments to the Nomenclature in order to update the terminology of certain products and to delete obsolete items	NR0216E1
7. Proposal by the ***US*** Administration to amend the Nomenclature to Chapter 41	NR0177E1 (RSC/24) NR0217E1
8. Proposal by the ***US*** Administration to amend the Nomenclature to heading 84.82	NR0218E1 NR0248E1
9. Proposal by the ***US*** Administration to amend the Nomenclature to heading 85.19	NR0219E1
10. Proposal by the ***US*** Administration to amend certain subheadings of heading 87.08	NR0220E1

TECHNICAL QUESTIONS—Continued

11. Study of possible amendments to the Nomenclature with regard to the classification of multifunctional digital copiers	NR0221E1 NR0234E1 NR0249E1 NR0250E1
12. Study of possible amendments to heading 30.01 with regard to human organs, tissues, etc.	NR0222E1
13. Possible amendment of heading 85.28 to provide separately for satellite television receivers (Proposal by the ***Egyptian*** Administration)	NR0223E1 NR0253E1
14. Possible amendment of Chapter 39 to provide separately for hygienic articles of plastics (Proposal by the ***Egyptian*** Administration)	NR0224E1
15. Possible amendment of heading 21.06 to specifically mention "food supplements"	NR0225E1 NR0257E1
16. Possible amendment of the Nomenclature and Explanatory Notes regarding silicones (Proposal by the ***US*** Administration)	NR0226E1
17. Proposal by the ***US*** Administration to merge headings 95.01 to 95.03 into a single heading for toys	NR0227E1
18. Deleted	
19. Proposal by the ***US*** Administration to amend the Nomenclature and Explanatory Note to heading 38.21	NR0256E1

B. NEW QUESTIONS

1. Possible amendment of the texts of subheadings 0805.40 and 2009.2 in order to align the French and English versions (Proposal by ***ALADI***)	NR0230E1
2. Possible amendments to the Nomenclature and the Explanatory Notes concerning heading 26.20 (Proposals by the ***Australian*** Administration and the Secretariat)	NR0231E1
3. Possible deletion of subheadings 4823.12 and 4823.19 (Proposal by the ***Brazilian*** Administration)	NR0232E1
4. Possible amendments to the structure of heading 84.18 (Proposal by the Secretariat)	NR0233E1
5. Possible amendments to the Nomenclature regarding the classification of flash electronic storage cards	NR0229E1
6. Possible amendments to headings 02.03 and 02.10 with regard to hams (Proposal by the ***Australian*** Administration)	NR0243E1
7. Possible amendments to the text of heading 08.02 to provide for macadamia nuts (Proposal by the ***Australian*** Administration)	NR0244E1
8. Possible amendments to the structured Nomenclature to heading 39.20 to provide for banknote substrates of plastics (Proposal by the ***Australian*** Administration)	NR0245E1
9. Possible creation of a new Note to Chapter 69 to define the term "refractory" (Proposal by the ***Australian*** Administration)	NR0246E1
10. Possible amendments to the text of subheading 9504.20 (Proposal by the ***Australian*** Administration)	NR0247E1
11. Possible amendments to heading 90.30 (Proposal by the ***US*** Administration)	NR0252E1
12. Possible amendments of subheading 8413.20 (Proposal by the ***EC***)	NR0254E1
13. Possible amendments to the structure of headings 73.04 and 73.06 (Proposal by the ***EC***)	NR0255E1
14. Possible amendment to the Explanatory Note to heading 84.71 concerning CD drives and DVD drives (Proposal by the ***US*** Administration)	NR0258E1
15. Possible amendments to Note 3 to Chapter 90 and Note 1 (m) to Section XVI (Proposal by the *Canadian* Administration	**NR0228E1**

TECHNICAL QUESTIONS—Continued

C. COMPREHENSIVE REVIEW OF THE EXPLANATORY NOTES

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, March 6, 2002.

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

DOUGLAS M. BROWNING,
Acting Assistant Commissioner,
Office of Regulations and Rulings.

REVOCATION OF RULING LETTER AND TREATMENT RELATING TO TARIFF CLASSIFICATION OF A GLASS PLATE ON A SNOWMAN FIGURINE BASE

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of a ruling letter and treatment relating to tariff classification of a glass plate on a snowman figurine base.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930, as amended, (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking one ruling letter pertaining to the tariff classification, under the Harmonized Tariff Schedule of the United States ("HTSUS"), of a glass plate on a snowman figurine base, and revoking any treatment previously accorded by Customs to substantially identical transactions. Notice of the proposed revocation was published on January 23, 2002, in the CUSTOMS BULLETIN. No comments were received in response to this notice.

EFFECTIVE DATE: This revocation is effective for merchandise entered or withdrawn from warehouse for consumption on or after May 20, 2002.

FOR FURTHER INFORMATION CONTACT: Deborah Stern, General Classification Branch, (202) 927–1638.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L.

103–182, 107 Stat. 2057), (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are **informed compliance** and **shared responsibility.** These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to Customs obligations, a notice was published on January 23, 2002, in the CUSTOMS BULLETIN, Volume 36, Number 4, proposing to revoke NY G89939, dated April 13, 2001, which classified the glass plate on a snowman figurine base, in subheading 7013.99.50, Harmonized Tariff Schedule of the United States (HTSUS). No comments were received in response to this notice.

As stated in the proposed notice, this revocation will cover any rulings on this merchandise which may exist but have not been specifically identified. Customs has undertaken reasonable efforts to search existing databases for rulings in addition to the one identified. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice should have advised Customs during the comment period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)(2)), Customs is revoking any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the HTSUS. Any person involved in substantially identical transactions should have advised Customs during the comment period. An importer's reliance on treatment of a substantially identical transactions or on a specific ruling concerning the merchandise covered by this notice which was not identified in this notice may raise the rebuttable presumption of lack of reasonable care on the part of the importer or its agents for importations subsequent to the effective date of this final decision.

In NY G89939, dated April 13, 2001, the "Snowman Table Server," which is comprised of glass plate on a snowman figurine base, was classified as a set put up for retail sale having the essential character of a decorative glass plate, and classified in subheading 7013.99.50, HTSUS, as: "Glassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purposes (other than that of heading 7010 or 7018), other glassware, other * * *: * * * valued over $0.30 but not over $3.00 each." It is now Customs position that the merchandise is a composite good comprised in part of agglomerated stone with plastic resin, classifiable under heading 6810, HTSUS, and in part of glass with worked edges, classifiable under heading 7006, HTSUS. The merchandise is classified in subheading 6810.99.00, HTSUS, as: "Articles of cement, or concrete or of artificial stone, whether or not reinforced: other articles: other."

Pursuant to 19 U.S.C. 1625(c)(1), Customs is revoking NY G89939 to reflect the proper classification of the glass plate on a snowman figurine base in subheading 6810.99.00, HTSUS, pursuant to the analysis in HQ 965125, which is set forth as an attachment to this document. Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs is revoking any treatment previously accorded by the Customs Service to substantially identical transactions.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after publication in the CUSTOMS BULLETIN

Dated: March 5, 2002.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, March 5, 2002.

CLA–2 RR:CR:GC: 965125 DBS
Category: Classification
Tariff No. 6810.99.00

MR. ROLANDO E. PORTAL
ABC DISTRIBUTING, INC.
6301 East 10th Avenue
Hialeah, FL 33013

Re: NY G89939 revoked; glass plate on a snowman figurine base.

DEAR MR. PORTAL:

This is in reference to your letter of June 19, 2001, requesting reconsideration of NY Ruling Letter G89939. In G89939, issued to you April 13, 2001, the Director, National Commodity Specialist Division, New York, classified a "Snowman Table Server" from China in subheading 7013.99.50, Harmonized Tariff Schedule of the United States (HTSUS),

which provides for decorative glassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purposes.

Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), notice of the proposed modification of the above identified rulings was published on January 23, 2002, in the CUSTOMS BULLETIN, Volume 36, Number 4. No comments were received. Our decision follows.

Facts:

A color advertisement of the article and a sample were submitted. The subject article is comprised of a glass slab with worked edges, measuring approximately 25.0 cm in diameter, sitting atop an agglomerated stone figurine of a snowman with a bird on its shoulder. The Customs laboratory determined that the figurine was composed of approximately 43% plastic resin and 57% calcium carbonate (Lab Report # NO20011393). A submission by the importer confirmed that the calcium carbonate was derived from real stone. The figurine base measures approximately 24.0 cm high and 18.0 cm at its widest. The head of the bird and the raised arm of the snowman are slightly flattened and protective pads are placed on them to accommodate the glass piece.

The New York Customs office determined that the subject article was a set put up for retail sale, and as such was classified under subheading 7013.99.50, HTSUS, providing for glassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purposes, other than that of heading 7010 or 7018, valued between $0.30 and $3. You contend that the subject article is a composite good and should be classified under subheading 7013.99.80, HTSUS, providing for glassware valued between $3 and $5. The essential character of the article was not challenged.

Issue:

What is the proper classification of the Snowman Table Server?

Law and Analysis:

Classification under the HTSUS is made in accordance with the General Rules of Interpretation (GRIs). GRI 1 provides that articles are to be classified by the terms of the headings and relative Section and Chapter Notes. For an article to be classified in a particular heading, the heading must describe the article, and not be excluded therefrom by any legal note. In the event that goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied.

In understanding the language of the HTSUS, the Harmonized Commodity Description and Coding System Explanatory Notes (ENs) may be utilized. ENs, though not dispositive or legally binding, provide commentary on the scope of each heading of the HTSUS, and are the official interpretation of the Harmonized System at the international level. Customs believes the ENs should always be consulted. *See* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

The HTSUS provisions under consideration are as follows:

6810	Articles of cement, or concrete or of artificial stone, whether or not reinforced:
	Other articles:
6810.99.00	Other
* * * * * * *	
7006.00	Glass of heading 7003, 7004, 7005, bent, edge-worked, engraved, drilled, enameled or otherwise worked, but not framed or fitted with other materials:
	Other:
7006.00.40	Other
* * * * * * *	
7013	Glassware of a kind used for table, kitchen, toilet, office, indoor decoration or similar purposes (other than that of heading 7010 or 7018):
	Other glassware:
7013.99	Other:
	Other:
	Other

8013.99.50	Valued over $0.30 but not over $3 each
* * * * * * *	
	Valued over $3 each:
	Cut or engraved:
7013.99.60	Valued over $3 but not over $5 each

In NY G89939, dated April 13, 2001, the Director, National Commodity Specialist Division, New York, classified the snowman table server according to the standards used to classify glass articles on metal stands. We have reconsidered that ruling and now believe that applying those standards to the subject snowman table server was misplaced. Glass articles with metal stands are not analogous to the subject good. With glass articles with metal stands, the glass is usually the larger component, has greater consumer appeal and is more important to the function of the article. *See* Informed Compliance Publication on *Decorative Glassware*, issued August, 2001; *see also Lamps, Lighting and Candle Holders*, issued March 1998 and *New Decisions on Candle Holders v. Decorative Glass Articles*, issued February, 2000. With respect specifically to table/kitchen glassware with metal racks, stands or bases, articles are classified by the glass component because the glass makes up the body of the article. *See* Informed Compliance Publication on *Table and Kitchen Glassware*, issued March, 2000. None of these is true of the snowman table server.

Here, the snowman base exceeds the glass component in size, weight and bulk. The snowman base provides the consumer appeal; the item is in fact advertised to "add wintry charm." The decorative nature of the merchandise outweighs the utilitarian value provided by the glass because the primary purpose of purchasing such an item is for decoration. As such, the snowman makes up the body of the article. Accordingly, the glass component is not classifiable as being of a kind of glassware of heading 7013, HTSUS, as originally classified. Rather, it is worked glass of a kind classifiable in heading 7006, HTSUS.

EN 70.06 states, in pertinent part, that the heading includes: "Glass with worked edges (ground, polished, rounded, notched, chamfered, beveled, profiled, etc.), thus acquiring the character of articles such as slabs for table tops. * * *" Chapter Note 3 to Chapter 70 states that "The products referred to in heading 7006 remain classified in that heading whether or not they have the character of articles. The glass component of the subject item is a flat slab of glass, round in shape, with ground and slightly rounded edges. Imported with the base, it has the character of a small table-top. Thus, the glass component is clearly an article of heading 7006, HTSUS.

Further, it is noted that the EN also states that glass plates for articles of furniture are classified with the articles of furniture if imported at the same time, whether or not assembled, and are intended for incorporation therein. However, the subject article as a whole is not furniture. The ENs to Chapter 94, the chapter for furniture, define "furniture" to mean "any 'movable' articles * * * which have the essential characteristic that they are constructed for placing on the floor or ground, and which are used, mainly with a utilitarian purpose * * *." This table server was not designed to be placed on the floor or ground, but rather on a raised surface (i.e., a table, counter, etc.). Nor is its purpose mainly utilitarian. The main purpose of the snowman table server is decorative, its utility is secondary. Therefore, the glass, though having the character of a table-top, is not furniture.

The snowman component is made of calcium carbonate, derived from stone, and reinforced with plastic resin. This material, known as agglomerated stone or artificial stone, is provided for in heading 6810, HTSUS. EN 68.10 states that the heading includes, *inter alia*, goods such as statues, statuettes and animal figurines, and ornamental goods. The snowman component is an article of heading 6810, HTSUS, which provides for articles of cement, concrete and artificial stone, whether or not reinforced.

The good is described in part only by heading 6810 and 7006, HTSUS. Thus it is properly classified according to GRI 3(b). EN (IX) to GRI 3(b) states that, "composite goods made up of different components shall be taken to mean not only those in which the components are attached to each other to form a practically inseparable whole but also those with separable components, **provided** these components are adapted one to the other and are mutually complementary and that together they form a whole which would not normally be offered for sale in separate parts." We are satisfied that the snowman table server satisfies the requirements of a composite good that is in part agglomerated stone of heading 6810, HTSUS, and in part a piece of glass with worked edges of heading 7006, HTSUS. Although not attached to the glass, the snowman base would not normally be offered for sale separately, as its arm is raised to hold up the glass slab, and protective pads secure the

glass to the snowman base. Similarly, the glass slab is cut to size to complement the snowman base.

As the item is a composite good, we must now determine which component imparts the essential character. EN VIII to GRI 3(b) explains that "[t]he factor which determines essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of the constituent material in relation to the use of the goods."

As discussed above, the bulk, weight and decorative nature of the snowman base exceeds the utility provided by the glass component. The snowman base provides the article with its essential character. Accordingly, the snowman table server is classifiable under heading 6810, HTSUS, as other articles of artificial stone, whether or not reinforced.

Holding:

The Snowman Table Server is classified in subheading 6810.99.00, HTSUS, which provides for, "articles of cement, of concrete or of artificial stone, whether or not reinforced: other articles: other."

Effect on Other Rulings:

NY G89939, dated April 13, 2001, is hereby revoked. In accordance with 19 U.S.C 1625(c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

PROPOSED REVOCATION OF RULING LETTER RELATING TO FILLING OUT TUBES AS A MANUFACTURING PROCESS UNDER 1313(B)

AGENCY: U.S. Customs Service; Department of the Treasury.

ACTION: Notice of proposed revocation of ruling letter issued under 19 U.S.C. 1313(b), manufacturing drawback.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling letter which pertains manufacturing drawback claim under 19 U.S.C. 1313(b). Similarly, Customs proposes to revoke any treatment previously accorded that is contrary to position set forth in this notice. Comments are invited on the correctness of the intended actions.

DATE: Comments must be received on or before April 19, 2002.

ADDRESS: Written comments are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Regulations Branch, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Submitted comments may be inspected at the same location during regular business hours.

FOR FURTHER INFORMATION CONTACT: Rebecca DeJesus, Duty and Refund Determination Branch (202) 927–2402.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are **"informed compliance"** and **"shared responsibility."** These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. §1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, this notice advises interested parties that Customs intends to revoke one ruling allowing a certain claimant 19 U.S.C. 1313(b) drawback privileges. Customs has determined to revoke the ruling because the described process is not covered by the statute. Although in this notice Customs is specifically referring to the revocation of (ACS) Ruling Letter # 44–04385–001 dated August 26, 1999 and (ACS) Ruling letter # 44–04385–000 dated September 29, 1995 as well as any treatment that may have resulted as the result of Customs action on claim BV800010008 (port 2704) and claims BV800010222, BV800010230, BV800010255, BV800010263, BV800010289, BV800010297, BV00010305, BV800010313 and BV800010339 (port 3901). This notice covers any rulings on this merchandise which may exist but have not been specifically identified that are contrary to the position set forth in this notice. Customs has undertaken reasonable efforts to search existing databases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (*i.e.*, ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, should advise Customs during this notice period.

Similarly, pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, Customs intends to revoke any treatment previously accorded by Customs to substantially

identical merchandise that is contrary to the position set forth in this notice. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of 19 U.S.C. 1313 drawback provisions. Any person involved with substantially identical merchandise should advise Customs during this notice period. An importer's failure to advise Customs of substantially identical merchandise or of a specific ruling not identified in this notice that is contrary to the position set forth in this notice, may raise issues of reasonable care on the part of the importer or their agents for importations of merchandise subsequent to the effective date of the final decision on this notice.

By letter, Customs acknowledged and authorized a letter of Notification of Intent to Operate Under a General Manufacturing Drawback Ruling (T.D. 81–300).

The manufacturing process was described in the following manner: "tubes, bottles, etc. will be filled with skin care and similar products, and closures, plugs, etc will be affixed, resulting in product ready for sale to end user". By approving this ruling, it was understood by the claimant that Customs held the ***filling*** of tubes to constitute a manufacturing or production process permissible under 19 U.S.C. 1313(b). Customs now intends to revoke both ruling and any treatment based on those rulings in order to reflect Customs' policy in that the stated operation does not fall within the purview of 19 U.S.C. 1313(b) statute nor what the courts have defined to be a "manufacturing process". Customs has determined that the filling process does not rise to the level of "manufacture" that is required for the purposes of manufacturing drawback under 1313(b). The filling process described began with imported foreign manufactured empty tubes being cleaned and automatically fed with lotion. The lower end is heated and then "crimped" to secure a seal of the contents. The tubes are then labeled for marketing purposes. We have determined that the imported plastic tube containers are being used for their intended purpose, to hold and transport the importer's product. In *U.S. v. Border Brokerage Co.* 48 C.C.P.A 10 (Cust. & Pat. App. 1960), it was held that the process of filling containers (such as bags with fertilizer and sewing them up) did not result in a change of condition that would qualify the goods to enter under temporary duty-free entry under section 305(1) of the Tariff Act of 1930 as articles to be "repaired altered or otherwise changed in condition". In *U.S. v Border Brokerage*, the purpose of the entry of the bags was to fill the bag with fertilizer. C.S.D. 79–40 defines "manufacture" or "production" for drawback as the process or processes which through labor and manipulation, change or transform an article or articles into a new and different article having a distinctive name, character and use (see, *Anheuser-Busch Brewing Ass'n v. U.S., (207 U.S. 556 (1907))*. It has been held that if an operation renders a commodity or article fit for use for which it was otherwise not

fit, the operation falls within "the letter and spirit" of "manufacture" *(United States v. International Paint Co. Inc.*, 35 C.C.P.A. 87, C.A.D. 376 (1948). In C.S.D. 79–40 the case explains that to be considered a "manufacture", a process must be viewed in terms of its results. "*Unless there is a new and different article having a distinctive name, character and use, there is no product of manufacture or production. Unless the process itself requires significant effort, measured in terms of capital, labor and complexity, the change is too insignificant to be considered a manufacture or production. All factors must be evaluated with reference to the specific fact.* Mere packaging is not considered a manufacture or production for drawback purposes. Manufacture or production for drawback purposes is defined under 19 C.F.R. 191.2(q) as:

> "Manufacture or production means: (1) a process including, but not limited to, an assembly by which merchandise is made into a new and different article having a distinctive "name character or use"; or (2) a process, including, but not limited to, an assembly, by which merchandise is made fit for a particular use even though it does not meet the requirements of paragraph (q)(1) of this section."

By the same token, Customs has also determined that the Amway's use of plastic bottles and jars in order to hold their finished products consisting of lotions and creams do not fall into the purview of a "manufacturing process". According to their assembly descriptions, Amway imports the plastic bottles, some of which are already constructed with pump assemblies and others with orifice reducers. The assembly process commences with an article which has already been constructed to hold Amway's product. During the filling process of these jars and plastic bottles, the lotions/creams are automatically dispensed and closures are inserted to ensure the flow of the product. Another type of product that Amway merchandises is the powder "godet". The godet consists of small aluminum rectangular shaped pans imported to hold the compressed powder. Customs has determined that while the injection of the compressed powder is a process in itself, the godet's function in this assembly process is merely to hold the pressed powder.

In HQ 226887 (May 1, 1997) we stated that the filling of imported bottles does not amount to a manufacture or production. It is well established that the filling of imported bottles with a substance is not a manufacture or production. In *Joseph Schlitz Brewing Co. v. United States*, 181 U.S. 584, 21 S. Ct. 740 (1901), the Supreme Court stated with respect to brewed beer and imported bottles, that the bottles and corks were not imported materials but finished products, and were not ingredients used in the manufacture of the beer, "but simply the packages" the manufacturer used.

Customs has determined that the process of using imported plastic tubes which are opened at the bottom and used to feed the claimant's product into it and subsequently sealed for the consumer's use does not constitute a manufacturing process under the definition of 19 C.F.R. 191.2. In C.S.D. 81–65 (dated September 4, 1980), Customs determined

that the filling of polypropylene bags was not a manufacturing process whereas a new and different article, having a distinctive name, character and use from the that which was imported. In C.S.D. 80–183, Customs held that the mere packing or filing of glass containers (vials) did not constitute a manufacture or production to satisfy the requirements of drawback law. However, Customs held that if, the vials were imported unsterilized and after importation the vials were sterilized (as described in the facts of the case), then, the making of hypothermic syringes constituted a manufacturing process under the drawback law. Sterilization, coupled with the assembly operations, created an article with a new name, an injectable, and a new character, the article was made capable for medical purposes.

In HQ 226898, dated February 10, 1997, Customs considered the situation involving an importer who assembled imported glass bottles and other integral parts such as caps and collars into scent sprayers for "packaging" fragrance products. Customs stated that mere packaging, and wrapping operations are not considered a manufacture or production for drawback purposes. However, when the assembly process of the imported bottles and other parts result in the creation of scent sprayers having a different character and use, then it would constitute a manufacturing or production process under the drawback law. In HQ 227906, dated May 27, 1998, Customs held that copy machine toner imported in bulk and repacked by filling in small cartridges or bottles and then exported would constitute a manufacturing process under the drawback provisions. An operation which creates an article fit for a new use for which it was otherwise not fit, enables a process to fall within the "letter and spirit" of a manufacturing process under the drawback provision. This case also cites HQ207865 dated June 25, 1977, which also pertained a copy machine toners imported in bulk and then being rebottled into smaller 600 milliliter bottles and repackaged for retail use. The retail bottles fit commercial copy machines whereas the bulk drums of 180 liters did not. The rebottling of the bulk toners into 600 milliliter bottles made the product suitable for immediate consumption. This process of rebottling in itself created an item with a new name character and use within the meaning of the drawback statute. In HQ 227976 (dated July 16, 1998) Customs held that a process involving the cutting and folding of rolled aluminum foil into bags (to add dry soup mix) was more than a mere "filling process". The process began with a roll of aluminum foil (not "preformed" foil bags) which, at the end of the process, the end product involved a change of name, character and use of imported aluminum foils. This type of manufacture or process qualified as a permissible operation under subheading 9813.00.05 HTSUS.

The cited decisions involve an examination of the relationship between imported parts and finished product. The packages are imported wholly manufactured outside the United States and merely filled up, *secured* and closed in the United States. The fact that the contents have been *secured* does not mean that a new item has been manufactured.

Based upon our analysis, it is our intention to revoke our decision allowing the affected importer to claim drawback on a filling process that does not constitute a "manufacturing" process under the applicable drawback provisions. The fact that when the empty imported tubes are filled with lotion and sealed closed, does not mean that "a change of condition" has occurred or that a manufacturing process is evidenced. According to *U.S. v Border Brokerage Co* the "change in condition" was merely incidental to the purpose of the entry, to hold and transport the contents of the marketed product. It is consistent with the existing Customs policy for the claimant to be precluded from requesting drawback privileges under 19 U.S.C. 1313(b) or (a) because the claimant has failed to establish that a manufacturing process created a new product with a different name, character or use from the product initially imported. A process whereby imported tubes are cleaned, filled and marked does not constitute a manufacturing production which would enable the importer to claim drawback privileges. Each tube is imported as a tube, filled and closed on one of its sides in order to hold the contents together. The tube is not transformed into a new and different article with a different name character or use than that originally imported. Likewise the plastic bottles, jars and godets, as imported, do not undergo a manufacturing process whereby a new and distinctive product is created. The imported tubes are being used for their intended purpose or primary purpose which is, to hold and transport the product that is being marketed by the importer. An article is used when it is employed for the purpose for which it was intended.

Customs intends to revoke any treatment previously accorded by Customs to substantially identical transactions that are contrary to the position set forth in this notice. Before taking this action, consideration will be given to any written comments timely received.

Dated: March 6, 2002.

WILLIAM G. ROSOFF,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Chicago, IL, August 26, 1999.

ENT–5–TO:REV:DB MMA
ACS RULING # 44–04385–001

AMWAY CORPORATION
ATTN: BRUCE H. HANSON
7575 Fulton Street
Ada, MI 49355–0001

Articles:	Skin/home care products and water/air treatment systems
Merchandise:	Closures, plugs, tubes, bottles, cartons, ultraviolet lamps, wiring harnesses, ballasts, power cords, circuit boards
Factories:	Ada, Michigan
Basis of claim:	Appearing in
Application signed:	August 19, 1999
Revokes:	44–04385–000

DEAR MR. HANSON:

Receipt of your letter of Notification of Intent to Operate Under a General Manufacturing Drawback Ruling, and acceptance of the terms and conditions specified in:

(1) Title 19, United States Code, 1313(b) and (i);
(2) Part 191 of the Customs Regulations; and
(3) General Drawback Ruling T.D. Number 81–300

is acknowledged, and your request to operate under the general manufacturing drawback ruling identified above is authorized.

This manufacturing drawback ruling shall be effective from the date of this letter, in accordance with the provisions of 191.8(h) of the Customs Regulations.

ROBYN DESSAURE,
Port Director.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Long Beach, CA, September 29, 1995.

DRA–1–O:C:T:L
RP:1c

BRUCE E. BENEDICT
AMWAY CORPORATION
7575 Fulton Street
Ada, MI 49355–0001

DEAR MR. BENEDICT:

This letter acknowledges receipt of your statement dated August 1, 1995, in which you agree to adhere to the conditions of the general contract published as Treasury Decision 81–300 dated December 3, 1981. This contract shall terminate fifteen years from the date of this letter unless renewed for another fifteen year period.

We have assigned a tracking number of 44–0435–000 to your contract. When filing under this contract, please place the number in box 16 on the Certificate of Manufacture and Delivery, (Customs Form 331).

RICHARD M. ANDREJKO,
Head, Liquidation Section I,
Commercial Operations.

[ATTACHMENT C]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

DRA–2–02–RR:CR:DR
228918 RDJ
Category Drawback

MR. JOSEPH F. DONOHUE
26 Broadway
New York, NY 10004

DEAR MR. DONOHUE:

Re: Packaging Material; Assembly of Personal Care Products; Manufacturing Process; Scope of General Drawback Ruling, T.D.81–300, 19 C.F.R. 191.7, 19 C.F.R. 191 Appendix A, 19 U.S.C. 1625; Ruling Revocation under Section 1625(c).

DEAR SIR OR MADAM:

This is in response to an internal advice request initiated by letter dated July 10, 2000 on behalf of Amway Corporation.

It is Customs intention to invoke the procedures established under section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), to revoke Amway's (ACS) Ruling Letter #44–04385–001 dated August 26, 1999 and (ACS) Ruling letter # 44–04385–000 dated September 29, 1995.

We have determined that the processes described in these rulings, those which specifically pertain the filling out of plastic tubes with lotion, the filling of plastic bottles, jars and godets which had been initially approved by Customs do not rise to the level of "manufacture" that is required for the purposes of manufacturing drawback under 1313(b). It is out intention to proceed with procedures under section 1625(c) to revoke the approval of the subject rulings. Customs intends not to allow a claim for drawback on these items because they do not fall into the purview of what is regarded to be a "manufacturing process". However, with respect to the assembly of fragrance sprays and nail enamel applicator, we have determine that these processes do constitute a "manufacturing process". Customs has determined to allow Amway to continue claiming drawback on these exported items.

The facts are as follow.

Facts:

On August 19, 1999, Amway Corporation filed a Notice of Intent to Operate Under General Manufacturing Drawback Ruling T.D. 81–300 with the Chicago Drawback Office. The imported merchandise to be used in the manufacture or production was described as closures, plugs, bottles, and cartons; the articles to be manufactured were described as skin care products and home care products. The manufacturing process was described as, *"tubes, bottles, etc will be filled with skin care and similar products and closures, plugs etc will be affixed, resulting in product ready for sale to end user"*. On August 26, 1999, the Chicago Drawback acknowledged and authorized Amway's request (ACS Ruling #44–04385–001). Amway proceeded to file its claims from March, 1999 to May, 2000.

In May, 2000 Customs conducted an onsite visit to verify Amway's manufacturing claim for tubes used for skin lotion. The Chicago Office informed Amway that the observed process was not a manufacturing operation, and that the tubes were being used merely as packaging material. Amway was informed that the tube was ineligible for unused drawback since it was being used for its intended purpose.

Customs has proceeded to review the processes described by Amway and has determined those regarding the assembly of fragrance sprayers and nail enamel can be considered a manufacturing process where drawback can be claimed upon exportation

As for the processes involving the filling of lotion tubes, plastic bottles, jars and godets, Customs intends to revoke Amway's approved ruling and any treatment based on those rulings in order to reflect Customs' policy in that the stated operations do not fall within the purview of 19 U.S.C. 1313(b). Customs has determined that the filling process does not rise to the level of "manufacture" that is required for the purposes of manufacturing drawback under 1313(b).

We hereby describe the processes in detail:

a. Fragrance Sprayer: the process being described as the sprayer components being loaded in the machinery and fragrance being dispensed into a bottle; the spray pump is inserted into the bottle; a ferrule ring on the pump skirt is crimped onto the bottle neck; an actuator is mechanically attached to the pump stem; a collar is seated over the actuator and pump closure so that it rests on the shoulders of the bottle; an overcap is seated over the actuator, pump and collar; and a label is affixed to the bottle.

b. Nail Enamel Container/Applicator: the process described as inserting the steel mixing beads into the bottle; dispensing the nail enamel into the bottle; mechanically inserting the brush/stem assembly into the bottle; seating the inner cap on top of the brush/stem and thredding it onto the bottle neck; affixing a label to the bottom of the bottle; mechanically placing the outer closure on top of the inner closure; and passing the bottle under the compression belt.

c. Tube Container/Dispenser: the process described as imported plastic tubes where a closure is affixed at the top and the bottom is open so that the product is fed into the tube from the bottom, then mechanically crimping and tapering the tube; and trimming off any rough or sharp edges.

d. Plastic Bottles, Jars and plastic godets: the process described as imported plastic bottles and jars are open on one end and closed on the other. Base product is dispensed inside; a disc is applied to the top of the jar; an orifice reducer is inserted; the bottle is capped; and labeled. The godets being small aluminum trays made to hold powder products. Base product is dispensed into the godets; the powder is pressed, imprinted; and the sides are cleaned of excess product.

Analysis:

Amway's drawback claims were filed under 19 U.S.C. § 1313 (b), which allows drawback on exported articles that are manufactured or produced with the use of imported merchandise or other merchandise of the same and kind quality. Manufacture or production for drawback purposes is defined in 19 C.F.R. § 191.2(q) as follows:

> (1) A process, including, but not limited to, an assembly, by which merchandise is made into a new and different article having a distinction "name, character or use", or
> (2) A process, including, but not limited to, an assembly, by which merchandise is made fit for a particular use even though it does not meet the requirements of paragraph (q)(1) of this section.

Amway also attempts to claim drawback based on the packaging material provision, 19 U.S.C. 1313(q) which states:

> (1) Packaging material, when used on or for articles or merchandise exported or destroyed under subsection (a), (b), (c), or (j) of this section shall be eligible under such subsection for refund, as drawback of 99 percent of any duty, tax and fee imposed under Federal law on the importation of such material.
> (2) Packaging material produced in the United States, which is used by the manufacturer or any other person on or for articles which are exported or destroyed under subsection (a) or (b), shall be eligible under such subsection for refund, as drawback, of 99 percent of any duty, tax and fee imposed on the importation of such material used to manufacture or produce the packaging material.

In Amway's submission dated July 10, 2000, Amway claimed that this provision allowed drawback to be claimed on merchandise as well as its packaging; the packaging should be claimed under the same provision of the law as the merchandise. Amway argued that the section does not state that drawback is only allowed on packaging material if drawback is claimed on the article being packaged.

In regards to section 1313(q), the statute clearly requires that in order to qualify for subsection (q), the merchandise must have had qualified under subsections (a), (b), (c), or (j). Sections (a) and (b) require that the packaging materials are "used in the manufacture or production of the articles." Section (c) requires that the merchandise be "nonconforming". Section (j) requires that the merchandise be "unused". Since Amway is not claiming that the material is nonconforming or unused; then, Amway would have to demonstrate that the packaging material is "used in the manufacture or production of the articles" as previously defined in 19 C.F.R. § 191.2(q) in order to apply for drawback under 19 U.S.C. 1313(q). Section 1313(q)(2) affords additional eligibility for packaging material which is produced in the United States that is used under 1313 (a) or (b). It provides for a refund of duties as a result of the importation of material used to produce the packaging material. Amway would have to prove that the products undergo a manufacturing process so that

Amway is qualified to request drawback privileges under 1313(b) and (q). We will proceed to discuss each item and the process to which it is subjected in order to determine if it constitutes a manufacturing process under Customs regulations (191.2(q)).

A. Fragrance Sprayer

Amway's fragrances are sold in sprayers consisting of domestically produced glass bottles, and imported pumps (classified under the Harmonized Tariff Schedule of the United States (HTSUS) subheading 8424.89.7090), actuators (HTSUS subheading 8424.90.9080), collars (HTSUS subheading 8309.90.0000), and overcaps (HTSUS subheading 8424.90.0000. The sprayer components are loaded in the machinery and fragrance is dispensed into the bottle; the spray pump is inserted into the bottle; a ferrule ring on the pump skirt is crimped onto the bottle neck; an actuator is mechanically attached to the pump stem; a collar is seated over the actuator and pump closure so that it rests on the shoulders of the bottle; an overcap is seated over the actuator, pump and collar; and a label is affixed to the bottle. After this assembly process "[s]cent sprayers and similar toilet sprayers" are created, classified as HTSUS under subheading 9616.10.00/2.2%.

The packaging of fragrance products requires assembly of a scent sprayer, in this instance the set of facts presented and the circumstances involved constitute more than a mere packing or filling of glass containers. The assembly process of the glass bottles and imported pump and parts result in scent sprayers having a different character and use than the initial imported articles.

Customs, in C.S.D. 79–40, stated that "[m]anufacture or production is defined for drawback as the process or processes which, through labor and manipulation, change or transform an article or articles into a new and different article having a distinctive name, character or use." *See Anheuser-Bush Brewing Ass'n v. United States*, (207 U.S. 556 (1907) (stating that "[t]he requirements that a manufactured article have a different character or use are satisfied when an imported article which is not suited for commercial use is further manufactured into one that is suited for commercial use.")

In the instant case, bottles and sprayer parts (pump, actuator and collar) are assembled into a scent sprayer to package fragrance products. In the case of *U.S. v Adolphe Scwob, Inc.* (62 Trea. Dec. 248 T.D. 45908 (1933)) the court held that assembly of watchcases and watch movements into watches were eligible for drawback under 19 U.S.C. 1313(a). In this case, the testimony of the witness, Mr. Mayer, enabled the court to conclude that, the using of individual parts so as to unite them in one unit to make a complete watch was much more than a mere assemble. Mr. Mayer did more than putting the parts together, he drilled and fitted the distinctive parts such as the movements, the stems, and the crowns and a new and distinctive item emerged. These distinctive parts *transformed* several separate units into one item called a "watch". In the case at hand, after assembly, the assembled product is sold together as a scent sprayer, which functions to perform the dispersing of the fragrance; thus creating a distinct product with a distinct function. Additionally, Customs held in a very similar case, HQ 226898, dated February 10, 1997, that the assembly operation to create a scent sprayer using glass bottles, caps, and collars is a manufacture or production for drawback purposes.

Based on the foregoing, it is our belief that there has been a change or transformation into a new and different article with a distinctive character and use. Therefore, there has been a manufacture or production process sufficient to qualify this operation for manufacturing drawback. Consequently, upon exportation of the completely assembled fragrance product, the pumps, actuators, collars, and overcaps are eligible for drawback pursuant to 19 U.S.C. §1313(b).

B. Nail Enamel Container/Applicator

The nail enamel container/applicator is assembled with a glass bottle, brush with stem, inner closure (cap), outer closure (cap) and stainless steel mixing beads.

The assembly process includes inserting the steel mixing beads into the bottle; dispensing the nail enamel into the bottle; mechanically inserting the brush/stem assembly into the bottle; seating the inner cap on top of the brush/stem and thredding it onto the bottle neck; affixing a label to the bottom of the bottle; mechanically placing the outer closure on top of the inner closure; and passing the bottle under the compression belt.

The earlier analysis of the decision in *Anheuser-Bush*, which provided the general rule that a manufacture or production changes or transforms an article into a new and different article having a distinctive character or use, can also be applied here. In *Tidewater Oil*

Co v. U.S. 171 U.S. 210, 216 (1897)) the court recognizes that a certain manufacture can be the result of a "partial manufacture" as well as the result of successive manufacturing processes to come to a distinct product. In the case at hand, before assembly, each unit (i.e. integral parts of nail enamel containers/applicators such as a glass bottle, brush with stem, inner closure (cap), outer closure (cap), and stainless steel mixing beads) cannot function separately and is not sold separately. After assembly, the assembled product is sold together as a nail enamel container/applicator, which functions to be used in dispersing of the nail enamel. In the case of *Tidewater*, the court deemed that if an assembly process is so elemental that the value of the "manufacture" is inconsequential, then the "mere put together" would not constitute a manufacture under the drawback provisions.

As with the fragrance sprayer, on the facts here, the parts do not stand alone to independently function nor do they have commercial identities and uses of their own. Their identities and uses do not remain the same after the assembly procedure. The finished product does not perform a function that is essentially the same as that performed by the parts individually. The finished product has a specific character and use different from its component parts unassembled, it is more that a container after assembly.

Based on the foregoing, it is our belief that there has been a change or transformation into a new and different article with a distinctive character and use. Therefore, there has been a manufacture or production process sufficient to qualify this operation for manufacturing drawback. Consequently, upon exportation of the completely assembled nail enamel container/applicator, glass bottle, brush with stem, inner closure (cap), outer closure (cap), and stainless steel mixing beads are eligible for drawback pursuant to *19 U.S.C. §1313*(b), upon compliance with the applicable requirements.

C. Tube Container/Dispenser

The imported plastic tubes that Amway uses are open at the bottom end with a closure affixed to the top. The process of filling these tubes entails positioning the tubes in a machine, passing hot air (to clean). The lotion is then fed into the open end and finally, mechanically crimped and tapered trimming off any rough or sharp edges.

Amway contends that this process of manufacture creates a new and different article of commerce. Customs does not agree that heating and crimping the tube (in order to secure the contents) is significantly different from the situation considered by the court in *United States v. Border Brokerage Co.* 48 C.C.P.A. 10 (Cust. & Pat. App. 1960) where the court found that the sewing shut of imported bags filled with domestically produced fertilizer does not rise to a significant manufacturing procedure for the purpose of manufacturing drawback. The court stated:

> [T]he bags are not so 'changed in condition' as to establish a free entry status under the provisions of Section 308(1), alleging that if the instant operation per se effects a 'change in condition' then the same reasoning would allow virtually ever container imported for filling and exportation free entry under Section 308(1); and that such a result would be contrary to the legislative intent as reflect by the legislative history regarding containers.

Id. at 12.

> [I]t is argued that Congress, in Section 308(7), specifically considered the conditions under which containers should be given free entry and, therefore, could not have intended Section 308(1) to allow free entry for containers imported for filling.

Id. at 13.

We have determined that the imported plastic tube containers are being used for their intended purpose, to hold and transport the importer's product. In *U.S. v. Border Brokerage Co.* 48 C.C.P.A 10 (Cust. & Pat. App. 1960), it was held that the process of filling containers (such as bags with fertilizer and sewing them up) did not result in a change of condition that would qualify the goods to enter under temporary duty-free entry under section 305(1) of the Tariff Act of 1930 as articles to be "repaired altered or otherwise changed in condition". In *U.S. v Border Brokerage*, the purpose of the entry of the bags was to fill the bag with fertilizer. C.S.D 79–40 defines "manufacture" or "production" for drawback as the process or processes which through labor and manipulation, change or transform an article or articles into a new and different article having a distinctive name, character and use (see, *Anheuser-Busch Brewing Ass'n v. U.S., (207 U.S. 556 (1907))*. It has been held that if an operation renders a commodity or article fit for use for which it was otherwise not fit, the operation falls within "the letter and spirit" of "manufacture" *(United States v. International Paint Co. Inc.*, 35 C.C.P.A. 87, C.A.D. 376 (1948). In C.S.D.

79–40 the case explains that to be considered a "manufacture", a process must be viewed in terms of its results. "*Unless there is a new and different article having a distinctive name, character and use, there is no product of manufacture or production. Unless the process itself requires significant effort, measured in terms of capital, labor and complexity, the change is too insignificant to be considered a manufacture or production. All factors must be evaluated with reference to the specific fact.* Mere packaging is not considered a manufacture or production for drawback purposes. Manufacture or production for drawback purposes is defined under 19 C.F.R. 191.2(q) as:

> "Manufacture or production means: (1) a process including, but not limited to, an assembly by which merchandise is made into a new and different article having a distinctive "name character or use"; or (2) a process, including, but not limited to, an assembly, by which merchandise is made fit for a particular use even though it does not meet the requirements of paragraph (q)(1) of this section."

According to their assembly descriptions, Amway imports the plastic bottles, some of which are already constructed with pump assemblies and others with orifice reducers. The assembly process commences with an article which has already been constructed to hold Amway's product. During the filling process of these jars and plastic bottles, the lotions/creams are automatically dispensed and closures are inserted to ensure the flow of the product.

In C.S.D. 81–65, Customs held that imported polypropylene bags were formed already at the time of importation and a mere sewing shut did not constitute a manufacture or production under drawback law. It was concluded that the bag did not become "a new and different article having a distinctive name" which came as a result of a manufacturing process.

The instant case can be differentiated from C.S.D. 80–183 where Customs held that "[t]he importation of empty unsterilized glass vials and the transformation of the glass vials into sterile injectables ready for use * * * constitutes a manufacturing or production process under the drawback law." In C.S.D. 80–183, there was an intensive sterilization process that resulted in (a new product) sterile injectables. In the situation at hand, the imported containers are merely cleaned, filled and closed with cosmetic products.

In C.S.D. 79–40 the case explains that to be considered a "manufacture", a process must be viewed in terms of its results. "*Unless there is a new and different article having a distinctive name, character and use, there is no product of manufacture or production. Unless the process itself requires significant effort, measured in terms of capital, labor and complexity, the change is too insignificant to be considered a manufacture or production. All factors must be evaluated with reference to specific facts (C.S.D 79–40).*

We have stated that mere packaging is not considered a manufacture or production for drawback purposes. We have determined that the process of using imported plastic tubes which are opened at the bottom and used to feed the claimant's product into it and proceed to seal it for the consumer's use does not constitute a manufacturing process under the definition of 19 C.F.R. 191.2. In C.S.D. 81–65 (dated September 4, 1980), it was decided that the filling of polypropylene bags was not a manufacturing process whereas a new and different article, having a distinctive name character and use from the that which was imported Likewise, in C.S.D. 80–183, Customs held that the mere packing or filing of glass containers (vials) did not constitute a manufacture or production to satisfy the requirements of drawback law. However, it distinguished the fact that if, the vials were imported unsterilized and, after importation, the vials underwent a thorough process of sterilization (as described in the facts of the case), then, the making of hypothermic syringes constituted a manufacturing process under the drawback law. In the case at hand, the cleaning process described (by blowing hot air into the tube) does not amount to a "sterilization" that would, under the reasoning of C.S.D. 80–183, constitute a "manufacturing" process.

Based upon our analysis, it is our intention to revoke our decision allowing the affected importer to claim drawback on a filling process that does not constitute a "manufacturing" process under the applicable drawback provisions.

D. Plastic Bottles, Jars & Godets:

The imported plastic bottles and jars that Amway uses are open on one end and closed on the other. Base product is dispensed into them; a disc is applied to the top of the jar; an orifice reducer is inserted; the bottle is capped; and finally labeled.

The assembly process commences with an article which has already been constructed to hold Amway's product. During the filling process of these jars and plastic bottles, the lo-

tions/creams are automatically dispensed and closures are inserted to ensure the flow of the product. Customs has determined that the process of using imported plastic tubes which are opened at the bottom and used to feed the claimant's product into it and subsequently sealed does not create a new article of commerce. In *Joseph Schlitz Brewing Co. v. United States*, 181 U.S. 584, 21 S. Ct. 740 (1901), the Supreme Court stated with respect to brewed beer and imported bottles, that the bottles and corks were not imported materials but finished products, and were not ingredients used in the manufacture of the beer, "but simply the packages" the manufacturer used.

The current situation, as described, is markedly different than the facts described in C.S.D. 80–183. In the C.S.D. 80–183 empty glass veils were imported in an unsterilized state and were subjected to a series of processes (including passing the vials on a stainless steel belt through a heating chamber of at least 538° F for a minimum of 30 minutes, filtering them through a stream of sterilized cool air, and finally filled with sterile antibiotics in a sterile room) that resulted in injectables having a different character and use than the initial imported articles.

Likewise, in C.S.D. 80–58, Customs ruled for drawback purposes that a "manufacture or production" occurred where imported eyeglass frames were fitted with domestic lenses. An eyeglass frame has no commercial use apart from becoming part of eyeglasses which have a commercial use. In the Amway case, the commercial use of jars remains the commercial use of jars. They are not new and different articles of commerce. In *Joseph Schlitz Brewing Co. v. U.S.* (181 U.S. 584, 21 S.Ct. 740, 742) the Supreme Court stated that, unlike the plaintiff's arguments, that imported bottles and corks for the bottling of beer was not to be regarded as an "imported material" to be added to a manufacturing process. The court stated that the bottles and corks were "simply the packages which the manufacturer, for the purposes of export, sees fit, and perhaps is required, to make use for the proper preservation of its product".

This case can also be differentiated from C.S.D. 79–39, which dealt with the importation of watch movements in watch casings, the removal of the movements from the casings for testing and adjustment, the return of the movements to the casings which were then tested for water resistance, the attachment of metal bracelets and the boxing of the finished products. On the basis of the general rule, Customs ruled that a manufacture took place because a new and different article was produced. Customs stated that the "end product is a watch, whereas the imported articles were watch parts." The watch "has a specific name, character and use different from its component parts unassembled or only partly assembled." In Amway's case the bottles and jars as originally imported remain bottles and jars, they are merely filled with a product. In HQ 227976, dated July 6, 1998, Customs held that even pre-printed and decorated aluminum foil imported as rolls did undergo a change in character, name and use when the importer processed the foil rolls into cutting, folding, filling and sealing, thus creating 7,500 new bags which served to contain dry soup. Amway's plastic bottles, jars, as well as the tubes have already been substantially manufactured in a foreign country and are only filled and sealed in the United States. Amway's products are basically formed and ready to be filled *before* importation to the United States.

In this situation, the packaging (whether it is a jar, bottle, tube, or dispenser) is imported as a functionable package and is merely filled. This filling process does not rise to the level of 'manufacture' that is necessary for the purposes of manufacture drawback. See *U.S. v. Border Brokerage Co.*, 48 C.C.P.A. 10 (Cust. & Pat. App. 1960).

As for the godets, Amway uses small aluminum trays known as godets to hold its powder products. Base product is dispensed into the godet; the powder is pressed and imprinted; and finally, the sides are cleaned of excess product. Customs has determined that while the injection of the compressed powder is a process in itself, the godet's function in this assembly process is merely to hold the pressed powder.

To allow drawback under 19 U.S.C. 1313(a), the godets must be used to manufacture or produce new articles for exportation. New and different articles of commerce must emerge from the process. In this situation, godets are imported and godets with powder are exported. These are not new and different articles of commerce. The godets do not fall under the purview of T.D. 81–300 because there is no manufacturing process whereby designated components would have been manufactured in accordance with the same specifications and from the same materials and identified according with any substituted components. Customs has determined that the godet is being imported as a finished product. When the godet was initially imported, its purpose was to hold Amway's pressed powder. This item

was not imported so that a process of manufacture would change its name, character and use. The item was imported as an empty godet and exported as a godet filled with Amway's product. In accordance with our ruling in HQ 207865, dated July 25, 1977, where the bulk importers of refined sugar satisfied the manufacture requirement by inserting small quantities of sugar in individually sized packages. In 207865 it was the sugar that was claiming drawback and that emerged in commerce as a consumer product; it was not the package. In Amway's case it is the packaging and not the powder that is claiming drawback. These godets were imported already manufactured as individual holders of powder and are exported as the same product.

Based upon our analysis, it is our intention to revoke our decision allowing the affected importer to claim drawback on a filling process that does not constitute a "manufacturing" process under the applicable drawback provisions. The fact that when the empty imported tubes are filled with lotion and sealed closed, does not mean that "a change of condition" has occurred or that a manufacturing process is evidenced. According to *U.S. v Border Brokerage Co.* the "change in condition" was merely incidental to the purpose of the entry, to hold and transport the contents of the marketed product. It is consistent with the existing Customs policy for the claimant to be precluded from requesting drawback privileges under 19 U.S.C. 1313(b) or (a) because the claimant has failed to establish that a manufacturing process created a new product with a different name, character or use from the product initially imported. A process whereby imported tubes are cleaned, filled and marked does not constitute a manufacturing production which would enable the importer to claim drawback privileges. Each tube is imported as a tube, filled and closed on one of its sides in order to hold the contents together. The tube is not transformed into a new and different article with a different name character or use than that originally imported. Likewise the plastic bottles, jars and godets, as imported, do not undergo a manufacturing process whereby a new and distinctive product is created. The imported tubes are being used for their intended purpose or primary purpose which is, to hold and transport the product that is being marketed by the importer. An article is used when it is employed for the purpose for which it was intended.

Customs intends to revoke any treatment previously accorded by Customs to substantially identical transactions that are contrary to the position set forth in this notice.

In summary:

Scent Sprayer:

The subject pumps, actuators, collars, and overcaps are eligible for drawback within 19 U.S.C. §1313(b). The described assembly operation to create a scent sprayer is sufficient manufacture or production for drawback purposes. Upon exportation of the assembled fragrance product, drawback can be obtained under 19 U.S.C. §1313(b), upon compliance with the applicable requirements.

Nail Enamel Container/Applicator:

The subject glass bottle, brush with stem, inner closure (cap), outer closure (cap), and stainless steel mixing beads are eligible for drawback within 19 U.S.C. §1313(b). The described assembly operation to create a nail enamel container/applicator is a manufacture or production for drawback purposes. Upon exportation of the assembled container/applicator, drawback could be obtained under 19 U.S.C. §1313(b), upon compliance with the applicable requirements.

Tube Container/Dispenser:

The heating and crimping closed of tubes does not create a new and different article of commerce as required to allow drawback under 19 U.S.C. 1313(a).

Plastic Bottles and Jars & Godets

The filling and sealing of bottles, jars and godets does not create a new and different article of commerce as required to allow drawback under 19 U.S.C. 1313(a).

WILLIAM G. ROSOFF,
(for John Durant, Director,
Commercial Rulings Division.)

PROPOSED REVOCATION OF RULING LETTER AND TREATMENT RELATING TO TARIFF CLASSIFICATION OF A CUTTLEBONE

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed revocation of a ruling letter and treatment relating to tariff classification of a cuttlebone.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930, as amended, (19 U.S.C. 1625(c)), this notice advises interested parties that Customs intends to revoke a ruling letter pertaining to the tariff classification of a cuttlebone or a cuttlefish bone under the Harmonized Tariff Schedule of the United States (HTSUS). Customs also intends to revoke any treatment previously accorded by Customs to substantially identical transactions. Comments are invited on the correctness of the proposed action.

DATE: Comments must be received on or before April 19, 2002.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Comments submitted may be inspected at the same address.

FOR FURTHER INFORMATION CONTACT: John G. Black, General Classification Branch, (202) 927–1317.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts that emerge from the law are **"informed compliance"** and **"shared responsibility."** These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)(1)), this notice advises interested parties that Customs intends to revoke a ruling letter pertaining to the tariff classification of a cuttlebone. They are composed primarily of calcium carbonate and are used to supply calcium and mineral nutrition for caged birds. Although in this notice Customs is specifically referring to New York Ruling Letter (NY) B80733, dated January 7, 1997, this notice covers any rulings on this merchandise that may exist but have not been specifically identified. Customs has undertaken reasonable efforts to search existing databases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice should advise Customs during this notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)(2)), Customs intends to revoke any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule of the United States (HTSUS). Any person involved in substantially identical transactions should advise Customs during this notice period. An importer's failure to advise Customs of substantially identical transactions or of a specific ruling not identified in this notice may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of the final notice of this proposed action.

In NY B80733, dated January 7, 1997, set forth as Attachment A to this document, Customs classified a cuttlebone under subheading 2309.90.95, HTSUS, which provides for: Preparations of a kind used in animal feeding: Other: Other: Other: Other: Other."

Since the issuance of this ruling, Customs has reexamined the competing tariff provisions and has determined that the original classification is in error. The product is provided for by name in heading 0508, HTSUS, providing it meets additional terms of the heading. Because the product meets those terms, it is correctly classified in heading 0508, HTSUS.

Pursuant to 19 U.S.C. 1625(c)(1), Customs intends to revoke NY B80733 and any other ruling not specifically identified in order to reflect the proper classification of the merchandise pursuant to the analysis set forth in proposed HQ 965481, set forth as Attachment B of this document. Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs intends to revoke any treatment previously accorded by the Customs Service to

substantially identical transactions. Before taking this action, we will give consideration to any written comments timely received.

Dated: March 5, 2002.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, NY, January 7, 1997.

CLA–2–23:RR:NC:2:231 B80733
Category: Classification
Tariff No.: 2309.90.9500

MR. KIM YOUNG
BDP INTERNATIONAL, INC.
2721 Walker NW
Grand Rapids, MI 49504

Re: The tariff classification of a cuttlebone from Taiwan.

DEAR MR. YOUNG:

In your letter, dated December 12, 1996, you have requested a tariff classification ruling on behalf of your client, Meijer Inc., Grand Rapids, MI.

The product is a 5–6 inch cuttlebone with a metal holder for installation in a bird cage. The item supplies calcium and mineral nutrition for cage birds. The sample is herewith enclosed.

The applicable subheading for the cuttlebone will be 2309.90.9500, Harmonized Tariff Schedule of the United States (HTS), which provides for preparations of a kind used in animal feeding, other, other, other, other, other. The rate of duty will be 2.2 percent ad valorem.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 CFR 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Ralph Conte at (212) 466–5759.

GWENN KLEIN KIRSCHNER,
Chief, Special Products Branch,
National Commodity Specialist Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:CR:GC 965481JGB
Category: Classification
Tariff No. 0508.00

MR. KIM YOUNG
BDP INTERNATIONAL, INC.
2721 Walker, NW
Grand Rapids, MI 49504

Re: NY B80733 revoked; cuttlebone.

DEAR MR. YOUNG:

Customs has reviewed the decision in New York Ruling Letter (NY) B80733, dated January 7, 1997, issued to you on behalf Meijer Inc., concerning the classification, under the Harmonized Tariff Schedule of the United States (HTSUS), of a cuttlebone and has determined that the classification is in error. Therefore, the classification of the merchandise provided in NY B80733 no longer reflects the view of Customs.

Facts:

The merchandise is described in NY B80733 was a 5 inch by 6 inch cuttlebone with a metal holder for installation in a bird cage. The item supplies calcium and mineral nutrition for birds kept in cages. The article is derived from the cuttlefish, a mollusk. During manufacture they are commonly cleaned with water, trimmed to various sizes (4–7 inches in length and 1–3 inches in width), soaked in hydrogen peroxide for whitening and to kill bacteria, and dried in ovens.

Issue:

Whether the cuttlebone is classified in subheading 2309.90.95, HTSUS, as preparations of a kind used in animal feeding; in heading 0508 which provides for cuttlebone, unworked or simply prepared but not cut to shape, or in heading 9601, HTSUS, which provides for ivory, bone, tortoise-shell, horn antlers, coral, mother-or-pearl, and other animal carving material, and articles of these materials.

Law and Analysis:

Classification under the Harmonized Tariff Schedule of the United States Annotated (HTSUS) is made in accordance with the General Rules of Interpretation (GRIs). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied.

In interpreting the HTSUS, the Explanatory Notes (ENs) to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the tariff at the international level, may be used. The ENs, although not dispositive or legally binding, facilitate classification under the HTSUS by offering guidance in understanding the scope of the headings. Customs believes the ENs should always be consulted. See T.D. 89–90, 54 Fed. Reg. 35127–28 (Aug. 23, 1989).

The HTSUS provisions under consideration are as follows:

0508:	Coral and similar materials, unworked or simply prepared but not otherwise worked; shells of molluscs, crustaceans or echinoderms and cuttlebone, unworked or simply prepared but not cut to shape, powder and waste thereof
2309.90.95:	Preparations of a kind used in animal feeding: Other: Other: Other: Other.
9601:	Worked ivory, bone, tortoise-shell, horn, antlers, coral, mother-of-pearls and other animal carving material, and articles of these materials (including articles obtained by molding)

This article is a composite good consisting of a cuttlebone and a metal clip, and, as such, cannot be classified by GRI 1, in that no single heading describes the article. The cuttle-

bone portion imported alone would be classified under one of the headings indicated *supra*. The metal clip component alone would be classified under heading 7326, HTSUS, the provision for other articles of iron or steel. Under the provisions of GRI 2, "the classification of goods consisting of more than one material or substance shall be according to the principles of rule 3." GRI 3 provides, in pertinent part, "When, by application of rule 2(b) or for any other reason, goods are, *prima facie*, classifiable under two or more headings, classification shall be effected as follows: * * * when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods * * * those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods." GRI 3(b) provides that "* * * composite goods consisting of different materials or made up of different components, shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable."

The ENs to GRI 3(b) at paragraph (VIII) lists, as factors to help determine the essential character of such goods, the nature of the materials or components, their bulk, quantity, weight or value, and the role of a constituent material in relation to the use of the goods.

The cuttlebone component of the article is the most prominently featured aspect in the marketing and packaging. The metal clip merely holds the article up against the birdcage enabling the bird easily to reach the cuttlebone with its beak. The clip represents a minor portion of the good and does not represent the reason for purchasing the good in that the function of the good appears to be to provide minerals to the bird. The cuttlebone component is the predominant feature of the article. It constitutes the largest and most visible portion of the article. Therefore, in considering the relationship or role of the cuttlebone component to the use of the entire article, we conclude that the cuttlebone component represents the essential character.

Heading 0508, HTSUS, provides by name for cuttlebone, provided it is "unworked or simply prepared but not cut to shape." This office has determined through investigation and sampling that the cuttlebone has typically been subjected to some cutting operation along the exterior edges. This process raises the question whether they have been "worked" or "cut to shape." Samples provided by another importer demonstrate that the raw cuttlebone which has been whitened and disinfected in a hydrogen peroxide bath, but not cut or otherwise processed consists of the same, or very similar shape as the "finished" article. In the unfinished article, the cuttlebone remains embedded in a mantle, a thin, brittle cartilaginous material that covers one face of the cuttlebone, extending out beyond the edge of the natural cuttlebone in a band of varying widths, measuring as little as a few millimeters in width up to approximately two centimeters. Customs learned from an ichthyologist at the Smithsonian Institution that this mantle consists primarily of a proteinacious material. The cuttlebone, in contrast, is primarily calcium carbonate. Thus, while the two components in the untrimmed product are of different materials, it is the calcium carbonate portion of the cuttlebone which presents the desirable commercial entity. In preparing the cuttlebone for commercial sale, the cartilaginous mantle, which readily snaps off by application of finger pressure, appears to be trimmed off the cuttlebone either with a knife blade or by some abrasive process. The trimming process, itself, yields a natural cuttlebone of the same size and shape as contained embedded in the untrimmed mantle. The cuttlebone, *per se*, has not been cut to a new shape or size. Therefore, the cuttlebone is no more than "unworked or simply prepared cuttlebone, not cut to shape." It has not been processed beyond simple cleaning and disinfecting in the hydrogen peroxide bath, which incidentally whitens the product, nor does the removal of the cartilaginous mantle constitute more than a simple preparation necessary to bring the crude cuttlebone into a saleable condition.

Heading 2309 provides for preparations of a kind used in animal feeding. The ENs to heading 2309 state that the heading covers "sweetened forage" and "prepared animal feeding stuffs consisting of a mixture of several nutrients designed: (1) to provide the animal with a rational and balanced daily diet (complete feed); (2) to achieve a suitable daily diet by supplementing the basic farm-produced feed with organic or inorganic substances (supplementary feed); or (3) for use in making complete or supplementary feeds." The cuttlefish bone or cuttlebone is neither "sweetened forage" nor "prepared animal feeding stuffs consisting of a mixture of several nutrients" as described in the ENs and, therefore, cannot qualify for classification in heading 2309.

Heading 9601 provides for ivory, bone, tortoise-shell, horn, antlers, coral, mother-of-pearl, and other animal carving material, and articles of these materials (including articles obtained by molding.) The ENs to the heading state:

> This heading relates to worked animal material (other than those referred to in heading 96.02). These materials are mainly worked by carving or cutting. Most of them may also be moulded.
>
> For the purposes of this heading, the expression "worked" refers to materials which have undergone processes extending beyond the simple preparations permitted in the heading for the raw material in question (see the Explanatory Notes to heading 05.05 to 05.08). The heading therefore covers pieces of ivory, bone tortoise-shell, horn, antlers, coral, mother-of-pearl, etc, in the form of sheets, plates, rods, etc., cut to shape (including square or rectangular) or polished or otherwise worked by grinding, drilling, milling, turning, etc. * * *
>
> Provided they are worked or in the form of articles, the heading includes the following:
>
> * * * * * * *
>
> (X) Shells of crustaceans and molluscs."

The cuttlebones examined by Customs for similar uses appear not to be worked, because the trimming away of the proteinaceous mantle does not alter the natural shape of the cuttlebone and does not constitute more than a simple preparation of the cuttlebone for its use as a dietary supplement and honing block for birds. Therefore, classification in heading 9601, HTSUS, is precluded.

Holding:

The cuttlebone is classifiable under heading 0508, HTSUS, as cuttlebone, unworked or simply prepared but not cut to shape.

NY B80733 dated January 7, 1997, is hereby REVOKED.

JOHN DURANT,
Director,
Commercial Rulings Division.

REVOCATION OF RULING LETTER AND TREATMENT RELATING TO TARIFF CLASSIFICATION OF ELECTRIC SIGNALING EQUIPMENT FOR MOTOR VEHICLES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of ruling letter and treatment relating to tariff classification of electric signaling equipment for motor vehicles.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking a ruling relating to the tariff classification of the Parking Assistant, and revoking any treatment Customs has previously accorded to substantially identical transactions. Notice of the proposed revocation was published on January 30, 2002, in the CUSTOMS BULLETIN.

EFFECTIVE DATE: This revocation is effective for merchandise entered or withdrawn from warehouse for consumption on or after May 20, 2002.

FOR FURTHER INFORMATION CONTACT: James A. Seal, Commercial Rulings Division (202) 927–0760.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are **informed compliance** and **shared responsibility.** These concepts are based on the premise that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's rights and responsibilities under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484, Tariff Act of 1930, as amended (19 U.S.C. 1484), the importer of record is responsible for using reasonable care to enter, classify and declare value on imported merchandise, and to provide other necessary information to enable Customs to properly assess duties, collect accurate statistics and determine whether any other legal requirement is met.

Pursuant to Customs obligations, a notice was published on January 30, 2002, in the CUSTOMS BULLETIN, Volume 36, Number 5, proposing to revoke *NY* F87653, dated June 21, 2000, which classified the Parking Assistant as other electric sound signaling apparatus, in subheading 8531.80.90, Harmonized Tariff Schedule of the United States (HTSUS). No comments were received in response to this notice.

As stated in the proposed notice, this revocation will cover any rulings on this merchandise which may exist but have not been specifically identified. Any party who has received an interpretative ruling or decision (i.e., ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice, should have advised Customs during the comment period. Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, Customs is revoking any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the HTSUS. Any person involved in substantially identical transactions should have advised Customs during this notice period. An importer's reliance on a treatment of substantially identical transactions or on a specific ruling concerning the merchandise covered by this notice which was not identified in this notice may raise the rebuttable presumption of lack of rea-

sonable care on the part of the importer or its agents for importations subsequent to the effective date of this final decision.

Pursuant to 19 U.S.C. 1625(c)(1), Customs is revoking *NY* F87653 to reflect the proper classification of the Parking Assistant in subheading 8512.30.00, HTSUS, as electric sound signaling equipment of a kind used for motor vehicles, pursuant to the analysis in *HQ* 965368, which is set forth as the Attachment to this document. Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs is revoking any treatment it previously accorded to substantially identical transactions.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after publication in the CUSTOMS BULLETIN.

Dated: March 6, 2002.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, March 6, 2002.

CLA–2 RR:CR:GC 965368 JAS
Category: Classification
Tariff No. 8512.30.00

MR. ROBERT RESETAR
PORSCHE CARS NORTH AMERICA, INC.
980 Hammond Drive
Atlanta, GA 30328

Re: *NY* F87653 Revoked; Parking Assistant.

DEAR MR. RESETAR:

In *NY* F87653, which the Director of Customs National Commodity Specialist Division, New York, issued to you on June 21, 2000, the Parking Assistant, a device to assist drivers when backing vehicles into parking spaces, was found to be classifiable in subheading 8531.80.90, Harmonized Tariff Schedule of the United States (HTSUS), as other electric sound signaling apparatus.

Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), notice of the proposed revocation of *NY* F87653 was published on January 30, 2002, in the CUSTOMS BULLETIN, Volume 36, Number 5. No comments were received in response to that notice.

Facts:

The Parking Assistant was described in *NY* F87653 as consisting of four sensors located on the rear bumper, and a control unit mounted under the driver's seat, the apparatus powered by the vehicle's electrical system. The sensors emit and receive ultrasonic waves at regular intervals. These waves are transmitted back to the control unit which triangulates the distance between the vehicle and an object behind it. The control unit emits an audible beep, presumably for the benefit of the driver, with the signal increasing to a con-

tinuous sound as the vehicle gets closer to an object. The actual distance from the object, however, is not displayed numerically.

The HTSUS provisions under consideration are as follows:

8512	Electrical lighting or signaling equipment (excluding articles of heading 8539), windshield wipers, defrosters and demisters, of a kind used for cycles or motor vehicles; parts thereof:
8512.30.00	Sound signaling equipment
* * * * * * *	
8531	Electric sound or visual signaling apparatus (for example, bells, sirens, indicator panels, burglar or fire alarms), other than those of heading 8512 or 8530; parts thereof:
8531.80	Other apparatus:
8531.80.90	Other

Issue:

Whether the Parking Assistant is a good of heading 8512.

Law and Analysis:

Under General Rule of Interpretation (GRI) 1, Harmonized Tariff Schedule of the United States (HTSUS), goods are to be classified according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6.

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs) constitute the official interpretation of the Harmonized System at the international level. Though not dispositive, the ENs provide a commentary on the scope of each heading of the HTSUS. Customs believes the ENs should always be consulted. *See* T.D. 89–80. 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989).

By its terms, heading 8531 excludes electric sound signaling apparatus of heading 8512. The qualifying language in heading 8512 "of a kind used for cycles or motor vehicles" denotes a provision governed by principal use, i.e., the use at or immediately prior to the date of importation of the goods of that class or kind to which an article belongs. The ENs on p. 1461 list horns, sirens and other electrical sound signaling appliances as being within the scope of heading 8512. It is reasonable and logical to conclude that the audible "beep" emitted by the control unit in the Parking Assistant qualifies as a type of sound signaling substantially similar to that produced by horns and sirens. Moreover, while a sample of the Parking Assistant is not currently available, our examination of substantially similar devices, their packaging and accompanying literature, leads us to conclude that the Parking Assistant belongs to a class or kind of sound signaling equipment principally used with motor vehicles. *See HQ* 964660 and *HQ* 964661, both dated January 4, 2001, motor vehicle alarm systems believed to be substantially similar to the Parking Assistant.

Holding:

Under the authority of GRI 1 the Parking Assistant is provided for in heading 8512. It is classifiable in subheading 8512.30.00, HTSUS.

Effect on Other Rulings:

NY F87653, dated June 21, 2000, is revoked. In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

U.S. Customs Service

Proposed Rulemaking

19 CFR Part 10

RIN 1515–AC88

PROTOTYPES USED SOLELY FOR PRODUCT DEVELOPMENT, TESTING, EVALUATION, OR QUALITY CONTROL PURPOSES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Proposed rule.

SUMMARY: This document proposes to amend the Customs Regulations in order to establish rules and procedures under the Product Development and Testing Act of 2000 (PDTA). The purpose of the PDTA is to promote product development and testing in the United States by allowing the duty-free entry of articles, commonly referred to as prototypes, that are to be used exclusively in product development, testing, evaluation or quality control. The proposed regulations set forth the procedures for both the identification of those prototypes properly entitled to duty-free entry, as well as the permissible sale of such prototypes, following use in the United States, as scrap, waste, or for recycling.

DATES: Comments must be received on or before April 8, 2002.

ADDRESSES: Written comments may be addressed to and inspected at the Regulations Branch, U.S. Customs Service, 1300 Pennsylvania Avenue, NW., 3rd Floor, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Patricia Fitzpatrick, Office of Field Operations, (202–927–1106).

SUPPLEMENTARY INFORMATION:

BACKGROUND

The Product Development and Testing Act of 2000 ("PDTA") was enacted on November 9, 2000, as part of the Tariff Suspension and Trade Act of 2000 ("Act") (Pub. L. 106–476). The provisions of the PDTA are found in sections 1431–1435 of the Act.

The purpose of the PDTA, as set forth in section 1432(b) of the Act, is to promote product development and testing in the United States by al-

lowing the importation on a duty-free basis of articles commonly referred to as "prototypes" that are to be used exclusively for such product development, testing, evaluation or quality control.

By way of background, Congress has found, as stated in section 1432(a) of the Act, that a substantial amount of product development and testing occurs in the United States incident to the introduction and manufacture of new products both for domestic consumption and for export overseas. Product testing also occurs with respect to products already introduced into commerce in order to ensure that these products continue to meet specifications and perform as designed.

Until the enactment of the PDTA, prototype articles have generally been subject to Customs duty when imported, unless the articles were eligible for duty-free treatment under a special trade program, such as the North American Free Trade Agreement (NAFTA) (19 U.S.C. 3301 *et seq.*), or unless they were entered under a temporary importation bond (TIB) (subheading 9813.00.30, Harmonized Tariff Schedule of the United States (HTSUS)).

Furthermore, the value of these prototypes had to be included in the dutiable value of any imported production merchandise that resulted from the same design and development efforts to which the prototype articles themselves were dedicated. In effect, duty on a prototype good was assessed twice, once when the prototype was imported and a second time as part of the dutiable value of the related imported production merchandise. In this latter respect, the prototype would be considered to be an "assist" (see § 152.102(a)(1), Customs Regulations (19 CFR part 152)) and, as such, it would have to be included in the dutiable cost of any associated production merchandise that was later imported.

Congress found that assessing duty twice on prototypes unnecessarily inflates costs for U.S. businesses, thereby reducing their competitiveness and thus discourages development and testing in the United States, and favors its occurrence overseas, given that duty would only be charged once, upon the subsequent importation of the related production merchandise.

Consequently, to provide for the duty-free entry of prototypes, section 1433 of the Act amended the Harmonized Tariff Schedule of the United States (HTSUS) by inserting a new subheading 9817.85.01 in Subchapter XVII of Chapter 98, HTSUS. The free rate of duty, as noted in HTSUS subheading 9817.85.01, only pertains to products from a country that would be entitled to the "Column 1" rate of duty; otherwise, the relevant rate would be that applicable in the absence of HTSUS subheading 9817.85.01.)

Additionally, section 1433 of the Act amended the HTSUS by including a new U.S. Note 6 in Subchapter XVII of Chapter 98, HTSUS, that defines the term "prototypes" as used in HTSUS subheading 9817.85.01.

As defined in U.S. Note 6(a) to Subchapter XVII, the term "prototypes" means originals or models of articles that are either in the pre-

production, production or postproduction stage and that are to be used exclusively for product development, testing, evaluation or quality control purposes. However, articles may not be classified as prototypes under HTSUS subheading 9817.85.01 if imported for automobile racing for purse, prize or commercial competition, as this activity is not considered to be product development, testing, evaluation, or quality control. For originals or models of articles that are in the production or postproduction stage to qualify as prototypes, they must be associated with a change in design from current production; this would include any refinement, advancement, improvement, development, or quality control in the product itself or in the means for producing the product.

Pursuant to U.S. Note 6(b) to Subchapter XVII of Chapter 98, HTSUS, prototypes may only be imported in limited noncommercial quantities based on industry practice. Moreover, any articles that are subject to quantitative restrictions, antidumping orders or countervailing duty orders may not be classified as prototypes. However, articles that are subject to licensing requirements, or that must comply with laws, rules or regulations administered by agencies other than Customs before being imported, may be entered as prototypes if they comply with all applicable provisions of law and otherwise meet the definition of prototypes in U.S. Note 6(a) to Subchapter XVII of Chapter 98, HTSUS.

In addition, except as provided by the Secretary of the Treasury, prototypes or parts of prototypes may not be sold after importation into the United States or be incorporated into other products that are sold.

By this document, Customs proposes to amend the Customs Regulations to add a new § 10.91, pursuant to sections 1433–1435 of the Act, that would: (1) establish requirements regarding the identification of prototypes at the time of their importation into the United States; and (2) establish requirements regarding the sale of prototypes, following their intended use in product development, testing and evaluation, as scrap, waste, or for recycling, if all applicable duties are tendered for sales of the prototypes, including prototypes and parts of prototypes that are incorporated into other products that are sold as scrap, waste, or recycled materials, at the rate of duty in effect for such scrap, waste, or recycled materials at the time of importation of the prototypes.

Declaration of Intent

Entry or withdrawal from warehouse for consumption of a prototype under HTSUS subheading 9817.85.01 may be accepted by the port director as an effective declaration that the articles will be used solely for the purposes stated in the subheading. If it is believed the circumstances so warrant, the port director may request the submission of proof of actual use, executed and dated by the importer. While there is no particular form proposed for this declaration, it may either be submitted in writing, or electronically as authorized by Customs, and must include a description of the use made of the articles set forth in sufficient detail so as to enable the port director to determine whether the articles have been entitled to entry as claimed.

SALE

The prototype or any part(s) of the prototype, after having been used for the purposes for which it was entered or withdrawn under HTSUS subheading 9817.85.01, may only be sold as scrap, waste, or for recycling. This includes a prototype or any part that is incorporated into another product, as scrap, waste, or recycled material. The importer must provide notice of such sale to the port director where the entry or withdrawal of the prototype was made. The notice of sale must be filed with a tender of appropriate duties within 10 business days of the sale.

While no particular form is required for the notice of sale, a consumption entry (Customs Form 7501), appropriately modified, or an electronic equivalent as authorized by Customs, may be used for this purpose. If the article sold is dutiable, the notice must also be accompanied by the payment of any duty due. In any case, a notice must be submitted in connection with the sale, whether or not duty is payable. If the notice is filed electronically, payment of any duty owed will be handled through the Automated Clearinghouse (see § 24.25, Customs Regulations (19 CFR 24.25)).

Such notice of sale must be executed by the importer, or other person having knowledge of the facts surrounding the sale, and it must include the following: the identity of the prototype, the consumption entry number under which it was imported, a copy of the declaration of actual use, and a description of the condition of the prototype following use for the intended permissible purposes, including any damage, degradation or deterioration to the article resulting from such use; the name and address of the party to whom the article was sold, and (if known) the use to which the party intends to put the article; the HTSUS subheading number for scrap, waste, or recycled material, as applicable, claimed in connection with the sale of the prototype, together with the corresponding rate of duty in effect at the time the prototype was originally imported for consumption; the value of the prototype article (if dutiable and the duty owed is based upon value); and the title of the party executing the declaration along with the date of execution.

For purposes of proposed § 10.91, with respect to any duty owed on prototypes or parts that are sold as scrap, or waste, or for recycling, where the duty owed is based upon value, the relevant value is the market value of the prototypes or parts, based upon their character and condition following use for the purposes prescribed in HTSUS subheading 9817.85.01. In this regard, the market value will generally be measured by the selling price. If a prototype or part of a prototype becomes a component of another product that is sold as scrap, waste, or recycled material, the relevant market valuewould be that portion of the selling price attributable to the component (that is, the prototype or part of prototype).

REQUIRED RECORDKEEPING

The importer must be prepared to submit to the Customs officer, if requested, such information, including any supporting documents, re-

ports and records, as was necessary for the preparation of the declaration of use and, if applicable, the notice of sale. As previously noted, the submission of the notice of sale, if a sale occurs, is mandatory. The supporting documentary evidence for the notice of sale must be retained for a period of 5 years, as provided in §163.4(a), Customs Regulations (19 CFR 163.4(a)), from the date of its filing in complete and proper form. Supporting records must be made available to the Customs officer upon request in accordance with § 163.6(a), Customs Regulations (19 CFR 163.6(a)). The notice, together with any related supporting evidence, may be subject to any verification that the port director reasonably deems necessary.

EFFECTIVE DATE

As noted in section 1435(1) and (2) of the Act, duty-free treatment under the PDTA applies to an entry of a prototype under HTSUS subheading 9817.85.01 made on or after the date of enactment of the Act (November 9, 2000) as well as to an entry of a prototype (as defined in U.S. Note 6(a) to Subchapter XVII of Chapter 98, HTSUS) made under subheading 9813.00.30, for which liquidation has not become final as of November 9, 2000.

In this latter regard, an entry under HTSUS subheading 9813.00.30 is made under a temporary importation bond (TIB), and an entry made under a TIB does not liquidate, given that a TIB entry does not involve liquidated duties (see § 10.31(h), Customs Regulations (19 CFR 10.31(h)). Rather, upon satisfaction of the terms and conditions of the TIB, charges under the bond are cancelled (see § 10.39, Customs Regulations (19 CFR 10.39)), and the related entry is "closed" (and not liquidated). Customs proposes in § 10.91 to give effect to the intent of Congress underlying section 1435(2) that certain prototypes already entered under a TIB as of November 9, 2000, be allowed to take advantage of duty-free entry under the PDTA.

To accomplish this, the importer must submit a written request, or an electronic equivalent as authorized by Customs, that a TIB entry under HTSUS subheading 9813.00.30, which had not been closed and for which the TIB period had not expired as of November 9, 2000, be converted instead into a duty-free consumption entry under HTSUS subheading 9817.85.01. Customs will so convert the TIB entry, provided that the port director is satisfied that the entry is for articles that are "prototypes" as defined in U.S. Note 6(a) to Subchapter XVII of Chapter 98, HTSUS, and provided further that the entry was in effect and had not been closed (as opposed to having been finally liquidated), and the TIB period for the entry had not expired, as of November 9, 2000. When the TIB entry is so converted, the bond will be cancelled and the entry closed. The port director will provide a courtesy acknowledgment to the importer in writing or electronically once the conversion is complete.

COMMENTS

Before adopting this proposal, consideration will be given to any written comments that are timely submitted to Customs. Customs specifically requests comments on the clarity of this proposed rule and how it may be made easier to understand. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4 of the Treasury Department Regulations (31 CFR 1.4), and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations Branch, U.S. Customs Service, 1300 Pennsylvania Avenue, NW. 3rd Floor, Washington, D.C.

REGULATORY FLEXIBILITY ACT AND EXECUTIVE ORDER 12866

The proposed regulations implement the terms and requirements of the PDTA which went into effect on November 9, 2000. The proposed amendments benefit the public by allowing the duty-free importation of prototypes that are to be used exclusively for product development and testing, thereby promoting such product development and innovation in the United States, as opposed to overseas. Accordingly, pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), it is certified that, if adopted, the proposed amendments will not have a significant economic impact on a substantial number of small entities. Nor do the proposed amendments meet the criteria for a "significant regulatory action" as specified in E.O. 12866.

PAPERWORK REDUCTION ACT

The collections of information encompassed within this proposed rule have previously been reviewed and approved by the Office of Management and Budget (OMB) in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507) and assigned OMB Control Numbers 1515–0091 (Requirement of importer to maintain accurate, detailed records on use or other disposition of imported merchandise for "actual use" duty assessment requirements); and 1515–0109 (Certificate of importer to verify actual use of articles imported duty-free or at a reduced rate of duty under actual use provisions). These collections encompass a claim for duty-free entry for prototype articles imported for use exclusively for development, testing, product evaluation or quality control purposes. This proposed rule does not present any material change to the existing approved information collections.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number assigned by OMB.

Upon adoption of the proposed amendments as a final rule, part 178, Customs Regulations (19 CFR part 178), containing the list of approved information collections, will be revised to make reference to new § 10.91.

DRAFTING INFORMATION

The principal author of this document was Janet L. Johnson, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PART 10

Customs duties and inspection, Imports, Preference programs, Reporting and recordkeeping requirements, Shipments.

PROPOSED AMENDMENTS TO THE REGULATIONS

It is proposed to amend part 10, Customs Regulations (19 CFR part 10), as set forth below.

PART 10—ARTICLES CONDITIONALLY FREE, SUBJECT TO A REDUCED RATE, ETC.

1. The general authority citation for part 10 would continue to read as follows, and specific sectional authority for § 10.91 would be added in appropriate numerical order to read as follows:

Authority: 19 U.S.C. 66, 1202 (General Note 22, Harmonized Tariff Schedule of the United States (HTSUS)), 1321, 1481, 1484, 1498, 1508, 1623, 1624, 3314.

* * * * * * *

§ 10.91 also issued under Pub. L. 106–476 (114 Stat. 2101), sections 1434, 1435;

* * * * * * *

2. It is proposed to amend part 10 by adding after § 10.90 a new center heading entitled "Prototypes" followed by a new § 10.91 to read as follows:

PROTOTYPES

§ 10.91 Prototypes used exclusively for product development and testing.

(a) *Duty-free entry; declaration of intent; suspension of liquidation.*

(1) *Entry or withdrawal for consumption.* Articles defined as "prototypes" and meeting the other requirements prescribed in paragraph (b) of this section may be entered or withdrawn from warehouse for consumption, duty-free, under subheading 9817.85.01, Harmonized Tariff Schedule of the United States (HTSUS), on Customs Form 7501 or an electronic equivalent. A separate entry or withdrawal must be made for a qualifying prototype article each time the article is imported/reimported to the United States.

(2) *Importer declaration.* (i) *Entry accepted as declaration.* Entry or withdrawal from warehouse for consumption under HTSUS subheading 9817.85.01 may be accepted by the port director as an effective declaration that the articles will be used solely for the purposes stated in the subheading.

(ii) *Proof of Actual Use.* If it is believed the circumstances so warrant, the port director may request the submission of proof of actual use, exe-

cuted and dated by the importer. While there is no particular form for this declaration, it may either be submitted in writing, or electronically as authorized by Customs, and must include the following:

(A) A description of the use to be made of the articles set forth in sufficient detail so as to enable the port director to determine whether the articles have been entitled to entry as claimed;

(B) A statement that the articles are not to be put to any other use; and

(C) A statement that neither the articles nor any parts of the articles will be sold, or be incorporated into other products that are sold, after the articles have been entered or withdrawn from warehouse for consumption and prior to the completion of their use as provided in HTSUS subheading 9817.85.01 (see paragraph (b)(2)(ii) of this section).

(b) *Articles classifiable as prototypes.* (1) *Prototypes defined.* In accordance with U.S. Note 6(a) to Subchapter XVII of Chapter 98, HTSUS, the term "prototypes" means originals or models of articles that:

(i) Are either in the preproduction, production or postproduction stage and are to be used exclusively for development, testing, product evaluation, or quality control purposes (not including automobile racing for purse, prize or commercial competition); and

(ii) In the case of originals or models of articles that are either in the production or postproduction stage, are associated with a design change from current production (including a refinement, advancement, improvement, development or quality control in either the product itself or the means of producing the product).

(2) *Additional requirements.* In accordance with U.S. Note 6(b) to Subchapter XVII of Chapter 98, HTSUS, the following additional restrictions apply to articles that may be classified as prototypes:

(i) *Importations limited.* Prototypes may be imported pursuant to this section only in limited noncommercial quantities in accordance with industry practice.

(ii) *Sale prohibited after entry and prior to use.* Prototypes or parts of prototypes may not be sold, or be incorporated into other products that are sold, after the prototypes have been entered or withdrawn from warehouse for consumption under HTSUS subheading 9817.85.01, unless, after having been used for the purposes for which they were entered or withdrawn from warehouse under HTSUS subheading 9817.85.01, such prototypes or any part(s) of the prototypes may be sold as scrap, waste, or for recycling, as prescribed in paragraph (d) of this section.

(iii) *Articles subject to laws of another agency.* Articles that are subject to licensing requirements, or that must comply with laws, rules or regulations administered by an agency other than Customs before being imported, may be entered as prototypes pursuant to this section if they meet all applicable provisions of law and otherwise meet the definition of prototypes in paragraph (b)(1) of this section.

(iii) *Articles excluded from being prototypes.* Articles subject to quantitative restrictions, antidumping orders or countervailing duty orders are excluded from being classified as prototypes under this section.

(c) *Sale of prototype following use.* (1) *Sale.* Prototypes or any part(s) of prototypes, after having been used for the purposes for which they were entered or withdrawn under HTSUS subheading 9817.85.01, may only be sold as scrap, waste, or for recycling. This includes a prototype or any part thereof that is incorporated into another product, as scrap, waste, or recycled material. In addition, prototypes or their parts may only be sold as scrap, waste, or for recycling, upon payment of applicable duty on the prototypes or parts, at the rate of duty in effect for such scrap, waste, or recycled materials at the time the prototypes were entered or withdrawn for consumption.

(2) *Notice of sale required.* If, after a prototype has been used for the purposes contemplated in HTSUS subheading 9817.85.01, the prototype or any part(s) of the prototype (including a prototype or any part that is incorporated into another product) is sold as scrap, waste, or for recycling, the importer must provide notice of such sale to the port director where the entry or withdrawal of the prototype was made. A notice must be submitted in connection with the sale, whether or not duty is payable. The notice, if applicable, should not be submitted prior to the submission of the declaration of actual use (see paragraph (c)(1) of this section).

(3) *Form and content of notice; tender of duty.* While no particular form is required for the notice of sale, a consumption entry (Customs Form 7501), appropriately modified, or an electronic equivalent as authorized by Customs, may be used for this purpose. The notice must be filed within 10 business days of the sale. If the article sold is dutiable, the payment of any duty due must be forwarded together with the notice (see paragraph (d)(1) of this section). If the notice is filed electronically, payment of any duty owed will be handled through the Automated Clearinghouse (see § 24.25 of this chapter). In addition, the notice of sale must be executed by the importer, or other person having knowledge of the facts surrounding the sale, and must include the following:

(i) The identity of the prototype, the consumption entry number under which it was imported, a copy of the declaration of actual use, along with a description of the condition of the prototype following use for the intended permissible purposes, including any damage, degradation or deterioration to the article resulting from such use;

(ii) The name and address of the party to whom the article was sold, and (if known) the use to which the party intends to put the article;

(iii) The HTSUS subheading number for scrap, waste, or recycled material, as applicable, claimed in connection with the sale of the prototype, together with the corresponding rate of duty in effect at the time the prototype was originally imported for consumption;

(iv) The value of the prototype article (if dutiable and the duty owed is based upon value) (see paragraph (e)(2) of this section); and

(v) The title of the party executing the declaration and the date of execution.

(4) *Failure to file timely notice.* Failure to file timely the notice of sale or to deposit the appropriate duty shall be a breach of the importer's bond and result in the assessment of liquidated damages.

(e) *Recordkeeping; retention and production.* (1) *Recordkeeping.* The importer must be prepared to submit to the Customs officer, if requested, such information, including any supporting documents, reports and records, as was necessary for the preparation of the declaration of use in paragraph (a)(2)(ii) of this section, and the notice of sale in paragraph (c)(3) of this section. The submission of the notice of sale is mandatory if a sale occurs after importation. The notice, together with any related supporting evidence, may be subject to such verification as the port director reasonably deems necessary. Such documentary evidence must be made available to the Customs officer, upon request, for a period of five years from the date of filing in complete and proper form, the declaration of use, if requested, and, if applicable, the notice of sale, as provided in § 163.4 of this chapter. The supporting records must be made available to the Customs officer upon request in accordance with §163.6 of this chapter. The specific documentary evidence necessary to support notice of sale, if applicable, consists of:

(i) The identity of the prototype, including the identity of the consumption entry under which it was imported, and a description of the condition of the prototype following use for the intended permissible purposes, including any damage, degradation or deterioration to the article resulting from such use;

(ii) The name and address of the party to whom the article was sold, and (if known) the use to which the party intends to put the article;

(iii) The HTSUS subheading number for scrap, waste, or recycled material, as applicable, claimed in connection with the sale of the prototype, together with the corresponding rate of duty in effect at the time the prototype was originally imported for consumption;

(iv) The value of the prototype article (if dutiable and the duty owed is based upon value) (see paragraph (e)(2) of this section); and

(v) The title of the party executing the declaration and the date of execution.

(2) *Relevant value for used prototype or parts sold.* For purposes of this section, with respect to any duty owed on prototypes or parts of prototypes that are sold as scrap, or waste, or for recycling, where the duty owed is based upon value, the relevant value is the market value of the prototypes or parts, based upon their character and condition following use for the purposes prescribed in HTSUS subheading 9817.85.01. The market value will generally be measured by the selling price. Should a prototype or part of a prototype become a component of another product that is sold as scrap, waste, or recycled material, the relevant market value would be that portion of the selling price attributable to the component (prototype or part) as provided in this paragraph.

(f) *Articles admitted under TIB.* (1) *Duty-free entry available.* Under the procedure presented in paragraph (f)(2) of this section, an entry of an article made under a temporary importation bond (TIB) solely for testing, experimental or review purposes under HTSUS subheading 9813.00.30 may be converted into a duty-free entry under HTSUS subheading 9817.85.01, if the following conditions exist:

(i) The article meets the definition for "prototypes" in paragraph (b) of this section (U.S. Note 6(a) to Subchapter XVII, Chapter 98, HTSUS); and

(ii) The TIB entry for the article was in effect and had not been closed, and the TIB period for the article had not expired, as of November 9, 2000.

(2) *Procedure for converting TIB entry to duty-free entry.* (i) *Importer request.* The importer must submit a written request, or an electronic equivalent as authorized by Customs, that a TIB entry made under HTSUS subheading 9813.00.30, which was in effect and had not been closed, and for which the TIB period had not expired, as of November 9, 2000, be converted instead into a duty-free consumption entry under HTSUS subheading 9817.85.01.

(ii) *Action by Customs.* Customs will convert the TIB entry under HTSUS subheading 9813.00.30 to a duty-free entry under HTSUS subheading 9817.85.01, provided that the port director is satisfied that the conditions set forth in paragraphs (f)(1)(i) and (f)(1)(ii) of this section have been met. When the TIB entry is converted, the bond will be cancelled and the entry closed. Once the conversion is complete, the port director will provide a courtesy acknowledgment to this effect to the importer in writing or electronically.

ROBERT C. BONNER,
Commissioner of Customs.

Approved: March 5, 2002.

TIMOTHY E. SKUD,
Acting Deputy Assistant Secretary of the Treasury.

[Published in the Federal Register, March 8, 2002 (67 FR 10636)]

United States Court of International Trade

One Federal Plaza
New York, N.Y. 10278

Chief Judge

Gregory W. Carman

Judges

Jane A. Restani
Thomas J. Aquilino, Jr.
Donald C. Pogue
Evan J. Wallach
Judith M. Barzilay
Delissa A. Ridgway
Richard K. Eaton

Senior Judges

Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg

Clerk

Leo M. Gordon

Decisions of the United States Court of International Trade

(Slip Op. 02–25)

AG DER DILLINGER HÜTTENWERKE, EKO STAHL GMBH, SALZGITTER AG STAHL UND TECHNOLOGIE, STAHLWERKE BREMEN GMBH, AND THYSSEN KRUPP STAHL AG, PLAINTIFFS *v.* UNITED STATES, DEFENDANT *v.* BETHLEHEM STEEL CORP., AND UNITED STATES STEEL LLC, DEFENDANT-INTERVENORS

Court No. 00–09–00437

[ITA's countervailing duty sunset determination remanded.]

(Dated February 28, 2002)

DeKieffer & Horgan (J. Kevin Horgan and *Marc E. Montalbine)* for plaintiffs.

Robert D. McCallum, Jr., Assistant Attorney General, *David M. Cohen*, Director, *A. David Lafer*, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, United States Department of Justice, *(John C. Einstman), Boguslawa B. Thoemmes* and *Edna Boyle-Lewicki*, Office of the General Counsel, United States Department of Commerce, of counsel, for defendant.

Dewey Ballantine LLP, (John A. Ragosta and *John W. Bohn)* for defendant-intervenors.

OPINION

RESTANI, *Judge:* This matter is before the court on a motion for judgment based upon the agency record pursuant to USCIT Rule 56.2. The motion has been brought by AG der Dillinger Huttenwerke ("Dillinger"), EKO Stahl GmbH, Salzgitter AG Stahl und Technologie, Stahlwerke Bremen GmbH and Thyssen Krupp Stahl AG (collectively "Plaintiffs"), respondents in a countervailing duty ("CVD") investigation.[1] *See Certain Steel Products from Germany,* 58 Fed. Reg. 37,315 (Dep't Comm. 1993) (final determ.) [hereinafter "Final Determination"]. At issue is the final determination by the Department of Commerce ("Commerce" or the "Department") pursuant to sunset review under 19 U.S.C. § 1675(c). *See Certain Corrosion-Resistant Carbon Steel*

[1] The German producers of corrosion-resistant flat products are listed in the Final Determination as follows: EKO Stahl GmbH, Salzgitter AG Stahl und Technologie, Stahlwerke Bremen GmbH and Thyssen Krupp Stahl AG. The German producers of cut-to-length carbon steel plate are listed as follows: AG der Dillinger Huttenwerke, Ilsenburg, Preussag and Thyssen.

Flat Products; Cold-Rolled Carbon Steel Flat Products; and Cut-to-Length Carbon Steel Plate Products from Germany, 65 Fed. Reg. 47,407 (Dep't Comm. 2000) (final sunset rev.) [hereinafter "Sunset Determination"]. Plaintiffs challenge the Sunset Determination principally on the following grounds: (1) Commerce improperly shifted the burden of proof to Plaintiffs to prove that the benefits under certain programs were not likely to continue; and (2) Commerce erred in not taking into account changes in law that took place subsequent to the initial investigation.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (1994). The court will uphold Commerce's determination in countervailing duty investigations unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B).

FACTUAL AND PROCEDURAL BACKGROUND

On June 30, 1992, the domestic steel industry, Bethlehem Steel Corporation and United States Steel LLC (collectively "domestic producers" or "petitioners") filed petitions with Commerce alleging that the Government of Germany ("Germany") was providing countervailable subsidies to its steel industry through various subsidy programs. Commerce subsequently conducted a countervailing duty investigation, and on July 9, 1993, issued a final affirmative determination that countervailable benefits had in fact been provided by Germany to its steel industry.[2] *See* Final Determination, 58 Fed. Reg. at 37,315. The period of investigation ("POI") for which subsidies were measured was 1991.

On September 1, 1999, Commerce initiated sunset reviews of the countervailing duty orders on corrosion-resistant and cut-to-length steel products from Germany.[3] *See Initiation of Five-year ("Sunset") Reviews of Antidumping and Countervailing Duty Orders or Investigations of Carbon Steel Plates and Flat Products*, 64 Fed. Reg. 47,767, 47,768 (Dep't Comm. 1999); *see also Transition Orders; Final Schedule and Grouping of Five-Year Reviews*, 63 Fed. Reg. 26,779, 26,786 (Dep't Comm. 1998).[4]

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[2] The products covered by this investigation included four separate classes of merchandise: (1) certain hot-rolled carbon steel flat products (2) certain cold-rolled carbon steel flat products, (2) certain corrosion-resistant carbon steel flat products, (3) certain cut-to-length carbon steel plate. In the Final Determination, Commerce determined the following net countervailable subsidies: for hot-rolled carbon steel products, 1.06% AV; for cold-rolled carbon steel products, 0.84 % AV; for corrosion-resistant carbon steel flat products, 0.59% AV; for cut-to-length carbon steel plate, 14.84% AV (country-wide including Dillinger). Final Determination, 58 Fed. Reg. at 37,326. Company specific rates for producers of corrosion-resistant carbon steel flat products were calculated as follows: 0.80% AV for Ilsenburg, 1.72% AV for Preussag, and 0.50% AV for Thyssen. *Id.*

[3] At the same time, Commerce initiated a sunset review of the countervailing duty order on cold-rolled carbon steel products from Germany. The International Trade Commission ("ITC" or the "Commission") determined that revocation of this countervailing duty order would not be likely to lead to recurrence of injury to the U.S. industry. Accordingly, this order was revoked and is not the subject of this action.

[4] Transition orders are those orders in effect on January 1, 1995, the effective date of the Uruguay Round Agreements Act. Commerce is obligated to initiate sunset reviews for all transition orders between July 1998 and December 31, 1999, and to complete those reviews by June 30, 2001. *See Policies Regarding the Conduct of Five-year "Sunset Reviews of Antidumping and Countervailing Duty Orders*, 63 Fed. Reg. 18,871, 18,872 (Dep't Comm. May 14, 1998) [hereinafter "Sunset Policy Bulletin"]. Transition orders are treated as if issued on January 1, 1995. *See* 19 U.S.C. § 1675(c)(6)(D).

On September 10, 1999, the domestic producers including Bethlehem Steel Corporation and U.S. Steel Group, a unit of USX Corp. (collectively "Defendant Intervenors"), filed notices of intent to participate in the sunset reviews. *See* P.R. Docs. 531, 533. The German producers filed notices of intent to participate on September 28, 1999. *See* P.R. Docs. 552, 553. On September 30, 1999, the Commission of the European Communities and the Government of Germany submitted substantive responses to the notice of initiation. *See* P.R. Docs. 577–78, 603.[5] On October 1, 1999, substantive responses were submitted by the German producers and the domestic producers. *See* P.R. Docs. 555, 556, 558, 560, Pl. App. Tabs 3, 4. Rebuttals to the substantive responses were filed by the various parties on October 15, 1999. *See* P.R. Docs. 593–602, 608. Having deemed the responses "adequate," Commerce decided to conduct a "full sunset review" rather than an abbreviated, expedited sunset review based on the facts available. *See* Sunset Determination at cmt. 1.

On November 9, 1999, the domestic producers filed a submission contesting Commerce's decision to conduct a full sunset review. *See* P.R. Doc. 632. On March 14, 2000, the German producers filed a submission discussing a pending decision of the WTO dispute settlement panel and a decision issued by the U.S. Court of Appeals for the Federal Circuit, both of which related to Commerce's change-in-ownership methodology. On March 16, 2000, the domestic producers submitted comments in response to the claims made in the German producers' March 14 submission. *See* P.R. Doc. 723. On March 17, 2000, the German producers filed a submission regarding the allocation period from the German depreciation schedule, which had been used in *Steel Wire Rod from Germany*, 62 Fed. Reg. 54,990 (Dep't Comm. Oct. 22, 1997) (final determ.) [hereinafter *"Steel Wire Rod"*].

On March 20, 2000, Commerce issued its preliminary results of the sunset review.[6] *Certain Corrosion-Resistant Carbon Steel Flat Products; Cold-Rolled Carbon Steel Flat Products; and Cut-to-Length Carbon Steel Products from Germany*, 65 Fed. Reg. 16,176 (Dep't Comm. March 27, 2000) (prelim. sunset determ.) [hereinafter "Preliminary Sunset Determination"]. In the Preliminary Sunset Determination, Commerce determined that revocation of the countervailing duty orders would be likely to lead to continuation or recurrence of a countervailable subsidies. *Id.* Commerce indicated that it relied on rates determined in the original investigation because no administrative review of the orders had been conducted. *Id.* at § II. Commerce found that grants were made

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[5] In its substantive response, the Government of Germany stated that there would not be any negative impact from the revocation of the countervailing duty orders because many of the programs previously investigated by Commerce had either been terminated or were non-actionable "green-light" subsidies under the WTO Agreement on Subsidies and Countervailing Measures. *See* Pl. App. Tab 2 at 3–7. The Government of Germany also informed Commerce of a European Commission decision prohibiting the granting of aid to the steel industry except for circumstances involving the closing of facilities, the adaptation of existing facilities to new environmental standards or research and development. Pl. App. Tab 2 at 3 (citing Commission Decision 2496/96 (Dec. 18, 1996)).

[6] Commerce preliminarily determined the following net countervailable subsidies pursuant to sunset review: 0.55 % AV for cold-rolled carbon steel flat products; 0.54% AV for corrosion-resistant carbon steel flat products, 14.84% AV country wide (including Dillinger), 1.62% AV for Salzgitter, and 0.5% AV for TKS. Commerce did not review hot-rolled carbon steel products.

under the Capital Investment Grants ("CIG") program after 1986, producing a benefit stream that would last beyond the end of the sunset review. *Id.* at § I.1.

After the preliminary results, counsel for the German producers contacted Commerce to request that the calculation memoranda from the original investigation be made part of the administrative record in the sunset reviews to clarify the issue of whether benefits were given after 1986. On April 13, 2000, counsel for the German producers made this request in writing. *See* Pl. App. Tab 9. In late April of 2000, the Government of Germany submitted its questionnaire response from the original investigation and verified information from the *Steel Wire Rod* investigation explaining Germany's regional assistance programs. *See* Pl. App. Tab 10.

On April 25, 2000, Commerce issued a letter returning the March 11 and March 17, 2000 submissions and striking them from the record, on the ground that it "normally will not accept or consider any additional information from a party after the time for filing rebuttals has expired unless the Secretary requests additional information from a party after determining to proceed to a full sunset review." *See* P.R. Docs. 742–43, Pl. App. Tab 11 at 1 (citing 19 C.F.R. § 351.218(d)(4)). On April 28, 2000, the domestic producers submitted its response to the German producers' request to place the calculation memoranda on the sunset review record. *See* P.R. Doc. 763, Pl. App. Tab 12. The response included portions of a questionnaire response of one of the German companies from the original investigation. *Id.*

On May 2, 2000, counsel for the German producers met with Commerce staff and again requested the inclusion of the calculation memoranda in the administrative record. In May 2000, the Government of Germany and the rest of the interested parties timely submitted case briefs. In early June 2000, all parties timely submitted post-preliminary determination rebuttal briefs, and a hearing was held on June 26, 2000.

On July 11, 2000, Commerce issued a letter striking the portion of the submissions from the record pertaining to "new factual information and/or materials * * * submitted in another proceeding." P.R. Doc. 849, Pl. App. Tab 15. In the same letter, Commerce indicated that it decided to keep in the sunset review record "the portion [of the submission] which were parts of the record in the original investigation of the orders, because they were submitted in connection with the original investigation and it is our practice to use information contained [in] the record of the investigation, where appropriate." *Id.*

On July 27, 2000, Commerce issued the final results pursuant to sunset review. Sunset Determination, 65 Fed. Reg. 47,407. In the Sunset Determination, Commerce determined that revocation of the countervailing duty orders would be likely to lead to continuation or recurrence of countervailable subsidies. *Id.* at 47,408. Commerce maintained the rates arrived at in the Final Determination for cut-to-length carbon steel products. *See* Sunset Determination at Background Section. With

respect to corrosion-resistant carbon steel flat products, however, Commerce made adjustments to the net subsidy rate for this class of subject merchandise by deducting the subsidy rates attributable to these programs.[7]

On December 15, 2000, Commerce published notice of the continuation of countervailing duty order. *See Certain Carbon Steel Products from Germany,* 65 Fed. Reg. 78,469 (Dep't Comm. 2000).

DISCUSSION

I. Scope of Commerce's Inquiry pursuant to Sunset Review

Under the Capital Investment Grants program, the Government of Germany provided grants to the iron and steel industry amounting to 20% of the acquisition cost of assets purchased or produced prior to January 1, 1986, and ordered or produced after July 30, 1981. Under the Investment Premium Act ("IPA"), grants (or "investment allowances") were provided to companies investing in three specific regions of Germany, calculated as a percentage of eligible expenditures in these areas. Companies were eligible for grants under the IPA only for investments made prior to January 1, 1991. In the Final Determination, after finding the grants given under these programs countervailable, Commerce deemed the benefits received "nonrecurring," and therefore allocable over fifteen years in accordance with 19 C.F.R. § 351.524. Final Determination at 37,316.

Pursuant to the sunset review, Commerce determined that benefit streams from the CIG and IPA programs continue beyond the end of sunset review. Commerce agreed with the domestic interested parties that certain manufacturers of the subject merchandise received "some benefits" from both the CIG and the IPA after January 1, 1985. Sunset Determination at cmt. 7. The German producers had argued that the benefits received under the CIG and/or IPA after that date were so small that they should be expensed in the year they were received. Commerce rejected this argument on the ground that "the record of these sunset reviews is not sufficient for us to definitively conclude whether [those benefits] were less than 0.5% of the corresponding beneficiary's annual net sales." *Id.* Commerce further found that "since no administrative reviews of the orders were conducted, we are unable to determine whether any additional benefits under these programs were received subsequent to the period of investigation." *Id.* Based on these findings, Commerce concluded that "the benefit streams from the Capital Investment Grants and Investment Premium Act Programs were likely to con-

[7] Pursuant to Sunset Review, Commerce maintained the Final Determination's country-wide (including Dillinger) rate of 14.84% AV for cut-to-length carbon steel plate. Commerce did make adjustments, however, to the net countervailable subsidies for certain producers of cut-to-length carbon steel plate. Specifically, Commerce adjusted rates as follows: for Ilsenburg to 0.80%, for Preussag to 0.77% AV, and for Thyssen (TKS) to 0.51% AV based on (1) findings in the original investigation regarding termination of three recurring subsidy programs (namely, the Structural Improvement Aids, the Zonal Area, and the Ruhr District Action Plan); and (2) a lack of evidence to controvert the Government of Germany's contentions that these programs had been terminated. Sunset Determination at cmt. 7. Commerce noted that "although Salzgitter is a successor-in-interest for both Ilsenburg and Preussag, without an appropriate review, we cannot discern the appropriate rate for the successor. Therefore, for Ilsenburg and Preussag, we are reporting the rates from the original investigation, as adjusted. Dillinger takes the country-wide rate, and TKS is the successor in interest of Thyssen." Sunset Determination at Final Results Section.

tinue beyond the end of sunset review, and that, therefore, a countervailable subsidy from the CIG and IPA to manufacturers of subject merchandise would be likely if the orders were revoked." *Id.*[8] Plaintiffs dispute this determination on the ground that Commerce impermissibly shifted the burden of proof to the Plaintiffs to show that the countervailable subsidies were *not* likely to continue or recur. Plaintiffs argue that by ignoring evidence of actual amounts given under the programs and of amortization of non-recurring benefits calculated in the original investigation, Commerce erroneously presumed that the benefit of almost all of the programs examined in the original investigation would continue undiminished after the end of the sunset review (July 27, 2000). Plaintiffs contend that Commerce erred in refusing to consider the following evidence: (1) information from a questionnaire submitted in the original investigation regarding amounts actually given to Preussag (predecessor to Salzgitter AG Stahl und Technologie) under the two programs after January 1, 1985; and (2) the calculation memoranda supporting the original CVD rate determination showing "the precise subsidy amount received by each producer in every year up to and including the 1991 period of investigation," as well as "annual net sales and * * * results of the expense test." Pl. Br. at 19.

Commerce counters that it did not presume or even determine that the non-recurring benefits at issue would continue undiminished, as such a determination would require calculations outside the scope of a sunset review. Commerce asserts that the legislative history and the regulations prevent it from making adjustments to the original CVD rate except under "extraordinary circumstances," which do not apply in this case. Commerce adds that even if it were permitted to make adjustments to the original CVD rate in this case, the record evidence was not sufficient to enable Commerce to do so. Defendant Intervenors further assert that there is a presumption that subsidization will continue or recur at the original CVD rate, and that Plaintiffs failed to rebut the presumption. Def.-Int. Br. at 9. The court finds that Commerce misconstrues: (A) the evidentiary burden applicable to its likelihood determination; and (B) the scope of its discretion to make adjustments based on that evidence.

A. Evidence Supporting the Likelihood Determination pursuant to Sunset Review

Pursuant to sunset review, Commerce must determine the likelihood of continuation or recurrence of a subsidy deemed countervailable in the original investigation if the order issued pursuant thereto were to be revoked. In the absence of an affirmative determination in this regard, the statute directs that the countervailing duty order be revoked. *See* Section 1675(d)(2) ("In a [sunset review], the administering authority

[8] Accordingly, Commerce determined that "the only programs which were found in the investigations to provide countervailable benefits * * * that have ceased to exist without any residual benefits are the Structural Improvement Aids, Ruhr District, and TRA/BvS with respect to corrosion-resistant and/or cold-rolled steel products and Zonal Area with respect to all steel products." Sunset Determination at cmt. 7. *See also* note 7, *supra*.

shall revoke a countervailing order * * * unless (A) the administering authority makes a determination that * * * a countervailable subsidy * * * would be likely to continue or recur[9], and (B) the Commission makes a determination that material injury would be likely to continue or recur * * *.).[10] The statute, however, does not charge any interested party with the ultimate burden of persuasion, or otherwise create a presumption that a countervailable subsidy is or is not likely to continue or recur if the order is revoked.[11] *See Eveready Battery Co., Inc. v. United States*, 77 F. Supp. 2d 1327, 1330 (Ct. Int'l Trade 1999) ("The only difference of significance * * * is that [the party seeking revocation] would bear the burden of persuasion in a changed circumstances review, but has no such burden in a sunset review."); *see also* 19 U.S.C. § 1675(b)(3)(A) (in changed circumstances review, party seeking revocation of an order shall have the burden of persuasion). Because there is no presumption as to the likelihood of continuation or recurrence, it follows that there is no presumption that the countervailable subsidies will continue at the specific rate determined in the original investigation.

Rather than place a burden of proof on either the foreign or the domestic interested parties, the statute provides that parties may submit information in their response to Commerce's notice of initiation of review. *See* 19 U.S.C. § 1675(c)(2) (notice of initiation requests interested parties to express their willingness to participate in the review, state the likely effects of revocation, and provide any "other information or industry data" as the agency may specify). If no interested party responds, the order is revoked. *See* 19 U.S.C. § 1675(c)(3)(A). The regulations further provide that in submitting a "substantive response," the parties must include, *inter alia*, "a statement regarding the likely effects of revocation of the order under review, which must include any factual information, argument, and reason to support such statement"; and "factual information, argument, and reason concerning the * * * countervailing duty rate * * * that is likely to prevail if the Secretary revokes the order * * * that the Department should select for a particular interested party." 19 C.F.R. § 351.218(d)(3)(ii)(F), (G). Under 19 C.F.R. § 351.218(d)(3)(iv)(B), "[a] substantive response from an interested party * * * also may contain any other relevant information or argument that the party would like the Secretary to consider." If a response is deemed "inadequate," the likelihood determination may be issued

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[9] Commerce made no findings pursuant to the sunset review regarding the likelihood of recurrence, as opposed to continuation.

[10] The ITC made an affirmative finding of continuation/recurrence of material injury with respect to both cut-to-length steel plate and corrosion-resistant carbon steel flat product. The ITC made a negative finding with respect to cold-rolled carbon steel flat products. This order was revoked and is not subject to this court action.

[11] *See Final Rule, 19 C.F.R. Parts 351, 353, and 355, Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,324–25 (Section 351.218) ("[W]e do not agree with the statement * * * that there is an internationally agreed preference for the revocation of old orders * * * [W]e do not find [a source for this preference] in either the Antidumping Agreement or the [Subsidies and Countervailing Measures, or "SCM"] Agreement. All that these agreements require is that national authorities periodically review an order or suspended investigations to determine whether the maintenance of the order or suspended investigation is necessary to remedy injurious dumping or countervailable subsidization. In addition, we find no basis in either the statute or the agreements for placing the burden of proof on the domestic industry.")

based on "facts available." 19 U.S.C. § 1675(c)(3)(B).[12] In this case, the responses were deemed adequate and Commerce proceeded to a "full sunset review."

The SAA distinguishes between a "full-fledged review" (or "full sunset review") involving fact gathering, and an "expedited review based on facts available." The SAA explains the distinction as follows:

> The facts available may include prior agency determinations involving the subject merchandise as well as information submitted on the record by parties in response to the notice of initiation. * * * [T]he agencies may decide separately whether responses are inadequate and whether to issue a determination based on the facts available without further fact-gathering. [Section 1675(c)(3)] is intended to eliminate needless reviews. * * * If parties provide no or inadequate information in response to a notice of initiation, it is reasonable to conclude that they would not provide adequate information if the agencies conducted a full-fledged review. However, when there is sufficient willingness to participate and adequate indication that parties will submit information requested throughout the proceeding, the agencies will conduct a full review.

SAA at 879–80. Thus, even in an "expedited review based on facts available," Commerce is to rely on information from prior determinations as well as from submissions by the parties in the sunset proceedings. *See also* 19 C.F.R. § 351.308(f) ("[w]here the Secretary determines to issue final results of sunset review on the basis of facts available, the Secretary normally will rely on: (1) calculated countervailing duty rates or dumping margins, as applicable, from prior Department determinations; and (2) Information contained in the parties' substantive responses to the Notice of Initiation * * *.").[13]

It stands to reason, then, that in a "full review," Commerce must engage in an analysis that is at least somewhat more searching than simply continuing to apply the CVD rate determined in the original investigation for particular subsidies without considering evidence proffered by the parties that would support making adjustments thereto. In addition, pursuant to its "fact-gathering" obligation in a full sunset review, Commerce may solicit more information as necessary. The court finds that Commerce did not fulfil its obligations pursuant to a full sunset re-

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[12] The Uruguay Round Agreements Act, Statement of Administrative Action ("SAA"), H.R. Doc. No. 103–316, at 879 (1994), explains that the extent of Commerce's obligations in conducting a sunset review depends on the parties' responses to the notice of initiation:

> Under new section [1675(c)(3)(A)], if there is no response from domestic interested parties to the notice of initiation, Commerce will revoke the order or terminate the suspended investigation within ninety days of the initiation of the review. Under new section [1675(c)(3)(B)], if there is inadequate response to a notice of initiation by foreign and domestic interested parties, Commerce and the Commission will conduct an expedited review based on the facts available and will issue final determinations within 120 days and 150 days, respectively, of the initiation of the review.

The SAA represents "an authoritative expression by the Administration concerning its views regarding the interpretation and application of the Uruguay Round agreements * * *." SAA at 656. "It is the expectation of the Congress that future Administrations will observe and apply the interpretations and commitments set out in this Statement." *Id.*

[13] At oral argument, Commerce argued that Commerce's obligations under a "full sunset review" are unlike those of the Commission. Commerce maintained that the essential distinction is that only Commerce conducts administrative reviews to set duty rates for specific past periods. This distinction has no real implication for sunset review, which serves a predictive function.

view because it failed to consider adequately the evidence on the record, or to seek additional evidence necessary to make its determination.

1. Allocation of Benefits under the CIG: Evidence relating to Preussag

In the Preliminary Sunset Determination, Commerce stated:

> Because the Department determined that CIG is a non-recurring program and that Preussag received the grant as late as in 1990, regardless of [Germany's] claim that CIG was terminated in 1985, or the EC's claim that the program no longer exists, based on the 15 year allocation period used by the Department in its investigations, we preliminarily determine that benefit streams from this program continue beyond the end of this sunset review and that, therefore, a countervailable subsidy from CIG to manufacturers/exporters of subject merchandise will continue to exist.

Preliminary Sunset Determination at § I.1. In the sunset determination, Commerce determined that "certain manufacturers of the subject merchandise received some benefits from both the CIG and IPA after January 1, 1985." Sunset Determination at cmt. 7 (citing Dillinger's October 15, 1999 Rebuttal Brief). Commerce's reasoning seems to be as follows: given that the program had been deemed nonrecurring, and Plaintiffs concede that amounts were given under the program as late as 1990; it follows that allocating these amounts over 15 years would cause benefits to continue beyond the end of sunset review. The issue raised in the Rebuttal Brief, however, was whether the amounts given after 1985 were more properly expensed in the year they were received.[14] Commerce did not reach this issue because it determined that it lacked the information necessary to determine the exact amounts given. The information, however, was readily available in Preussag's questionnaire submitted in the original investigation, and Plaintiffs satisfied their evidentiary burden by requesting that Commerce consider the amounts specified therein. Therefore, the court rejects Commerce's explanation that it lacked the information necessary to determine whether the amounts given after 1985 were *de minimis*, and instructs Commerce to consider the information on the record to determine whether the amounts should be allocated over time or expensed in the year received.

2. De Minimis Net Subsidy Rate: Calculation Memoranda

Plaintiffs contend that with respect to corrosion-resistant carbon steel flat products, the calculation memoranda from the original investigation show that under Commerce's methodology for allocating nonrecurring subsidies, and applying a discount rate of 8%, the benefit of the subsidies given under the CIG would decline by at least 3.6% annually, diminishing to a rate of 0.26% by 2000 (rather than the 0.39% calculated by Commerce in the original investigation and retained by

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[14] In the Rebuttal Brief, Dillinger had disputed the domestic producers' contention that a substantial portion of the nonrecurring assistance paid to Preussag was received after 1986. Plaintiffs indicated in the Rebuttal Brief that Preussag's questionnaire response in the original investigation showed that "99.4% of the Capital Investment Grants and 99.6% of the Investment Premium Act Grants given to Preussag were received prior to the end of the 1985/1986 fiscal year." Rebuttal Brief, P.R. Doc. 597, Pl. App. Tab 5, at 4 n.6.

Commerce in the sunset review). *See* 19 C.F.R. § 351.524(d) (providing a formula for allocating a non-recurring benefit over time and determining the annual benefit amount that should be assigned to a particular year). Under Plaintiffs' calculations, adjusting the amount attributable to the CIG program in the original investigation would result in a *de minimis* net subsidy rate of 0.41% in the sunset review for all programs combined.[15] Similarly, Plaintiffs maintain that if Commerce applied its methodology for allocating benefit streams over time, it would have found that the CVD rate attributable to the IPA for cut-to-length carbon steel flat products (0.06%) would decline by over 32% by 2000.[16]

In the Preliminary Sunset Determination, Commerce indicated that there were inconsistencies in the evidence regarding whether the CIG would continue to provide countervailable benefits beyond the end of sunset review. Preliminary Sunset Determination at § I.1. The German producers requested that Commerce make the calculation memoranda from the original investigation part of the administrative record of the sunset review. Commerce rejected this request as untimely. Commerce stated that "[i]nsofar as Dillinger could have submitted some version [e.g., a public version] of the memoranda in the sunset reviews, we determined that * * * Dillinger did not file the information in a timely manner." Sunset Determination at cmt.4.

The record from the original investigation may be incorporated into the record for purposes of the sunset review. *See Floral Trade Council v. United States*, 13 CIT 242, 243, 709 F. Supp. 229, 230 (1989) ("in a case * * * where the agency in its decision states without qualification that it has examined 'the original investigations' * * * the court must assume that all relevant information from those previous investigations is before the agency for the purpose of the current decision."). Further, in the past, even in an expedited sunset review Commerce apparently has accepted untimely submissions relating to "important factual information that is already on the record of this [sunset review] proceeding, i.e., in the [prior] administrative review segment." *See Iron Metal Castings from India*, 64 Fed. Reg. 37,509, 37,511 (Dep't Comm. 1999) (amd'd final sunset review determ.).

Thus, it is sufficient that Plaintiffs alerted the agency in their substantive response or rebuttal to the other interested parties' substantive response that the countervailable benefits accruing from the

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[15] Plaintiffs urge that, for the purpose of sunset review, Commerce should deem a countervailable subsidy rate of less than 1.0% AV as *de minimis*, rather than 0.5% AV according to post-URAA law. *See* 19 U.S.C. § 1671b(b)(4)(A). According to the regulations, however, the change to a 1.0% AV *de minimis* rate affects only preliminary or final determinations. *See* 19 C.F.R. § 351.106(b). Section 351.106(c) specifies that "[i]n making any determination other than a preliminary or final antidumping or countervailing duty determination in an investigation * * * the Secretary will treat as *de minimis* any weighted-average dumping margin or countervailable subsidy rate that is less than 0.5% AV, or the equivalent specific rate."

[16] The statute specifies that a *de minimis* net countervailable subsidy "shall not by itself require the administering authority to determine that revocation of a countervailing duty order or termination of a suspended investigation would not be likely to lead to continuation or recurrence of a countervailable subsidy." 19 U.S.C. § 1675a(b)(4). *See also* SAA at 889 (delineating criteria for a no likelihood determination where there is evidence of *de minimis* benefits). Plaintiffs concede that Commerce is not bound by a finding pursuant to sunset review that the net countervailable subsidy would be *de minimis*, but maintain that in this case Commerce failed to fulfil its obligation to make such a finding. Commerce has not indicated any case in which an affirmative likelihood determination was made in spite of a *de minimis* finding.

nonrecurring subsidies would be *de minimis*. The court finds that the issue was raised with sufficient clarity to put Commerce reasonably on notice in a timely manner that it needed to consider the data underlying the calculation of the original CVD rate. *See* Rebuttal Brief, P.R. Doc. 597, Pl. App. Tab 5, at 4 ("[I]t is clear that none of the recurring subsidies reviewed by the Department in the original investigation would provide any meaningful countervailable benefit that continues after the end of this review."). To the extent Commerce needed information beyond these calculation memoranda, it could have requested the information from the parties or from a third source. Accordingly, Commerce shall consider the calculation memoranda as part of the record in this proceeding.[17]

B. Scope of Commerce's Discretion to make Adjustments

1. Framework for Inquiry

Commerce maintains that, even if it considers the evidence described above, it is restricted from making adjustments to the net countervailing duty rates determined in the original investigations where no administrative review has been conducted. As a preliminary matter, the statute does not explicitly prevent any adjustments from the original CVD rate. Rather, the statute sets up a framework for inquiry in making the likelihood determination. Section 1675a(b)(1) directs Commerce in a sunset review to consider:

> A. The net countervailable subsidy determined in the investigation and subsequent reviews; and
>
> B. Whether any change in the program which gave rise to the net countervailable subsidy described in subparagraph A has occurred that is likely to affect that net countervailable subsidy.

That Commerce shall "consider" the original CVD rate does not, by itself, indicate that Commerce may not make adjustments thereto. It does not necessarily follow from a statutory directive for an agency to consider certain facts, that the agency may not consider *other* facts. Indeed, the second required consideration provides that Commerce shall determine whether adjustments are necessary based on "changes in the program." The SAA specifies, however, that where benefits are allocated over time, "Commerce will consider whether the fully allocated benefit stream is likely to continue after the end of the review, without regard to whether the program that gave rise to the long-term benefit continues to exist." SAA at 889. *See also* Sunset Policy Bulletin at § III.A.4. Thus, a non-recurring subsidy, though terminated, may factor into Commerce's likelihood determination where the benefits accruing therefrom are allocated beyond the sunset review period. This provision, however, does not absolve Commerce of its obligation to "consider" the original

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[17] Plaintiffs also argue that Commerce's rule that parties cannot submit factual information after the first 35 days of a sunset review proceeding violates the parties' rights under the WTO Subsidies Agreement to have an ample opportunity to present all relevant evidence in writing. Because the court finds that Commerce failed to fulfil its statutory obligation by not considering the calculation memoranda, the issue of compliance with the Subsidies Agreement need not be reached.

CVD rate in light of facts and arguments raised by the parties in exercising their right to participate in a sunset review.

2. Selection of CVD Rate

The statute indicates that Commerce is to provide the Commission with the net countervailable subsidy that is "likely to prevail" if the order is revoked, and that Commerce "shall normally choose a net countervailable subsidy that was determined under [19 U.S.C. § 1671d regarding final determinations] or [19 U.S.C. § 1675(a) regarding administrative reviews, or § 1675(b)(1) regarding changed circumstances reviews]." 19 U.S.C. § 1675a(b)(3). The SAA explains that—in light of the directive under section 1675a(b)(3) that Commerce provide the Commission with the net countervailable subsidy that is "likely to prevail"—it may be more appropriate in certain instances for Commerce to choose a CVD rate other than that derived in the original investigation. The SAA provides the following guidance:

> The Commission may consider likely * * * net countervailable subsidies to be relevant to its analysis of the likelihood of injury. [Section 1675a(b)(3)] direct[s] Commerce to provide the Commission with the net countervailable subsidies * * * likely to prevail in the event of revocation or termination. Commerce normally will select * * * net countervailable subsidies determined in the original investigation or in a prior review. The Administration intends that Commerce normally will select the rate from the investigation, because that is the only calculated rate that reflects the behavior of exporters and foreign governments without the discipline of an order or suspension agreement in place. In certain instances, a more recently calculated rate may be more appropriate.[18]

SAA at 890. That Commerce will "normally select" a net countervailable subsidy calculated in the original investigation or a prior review does not in any way indicate that Commerce is "barred" from making adjustments thereto based on information gathered in a sunset review. In this case, Commerce does not argue that the original rate should be used because it better predicts future behavior. Rather, it emphasizes the inconvenience of conducting a broader sunset review instead of an ordinary administrative review to determine a proper rate. The SAA contemplates that "in certain instances" Commerce may select a rate other than the one derived in the original investigation. The SAA does not limit the instances in which another selection may be "more appropriate," nor does it explicitly prevent adjustments from being made

[18] The Sunset Policy Bulletin parallels the language of the SAA, and reads as follows:

> The Department normally will provide to the Commission the net countervailable subsidy that was determined in the original investigation. However, the purpose of the net countervailable subsidy in the context of sunset reviews is to provide the Commission with a rate which represents the countervailable rate that is likely to prevail if the order is revoked or the suspended investigation is terminated.
>
> [Section 1675a(b)(1)(B)] of the act provides that the Department will consider whether any change in the program which gave rise to the net countervailable subsidy determination in the investigation or subsequent reviews has occurred that is likely to affect the net countervailable subsidy. Consequently, although the SAA at 890, and the House Report at 64, provide that the Department normally will select a rate from the investigation, this rate may not be the most appropriate if, for example, the rate was derived (in whole or in part) from subsidy programs which were found in subsequent reviews to be terminated, there has been a program-wide change, or the rate ignores a program found to be countervailable in a subsequent administrative review.

Sunset Policy Bulletin at § III.B.3.

pursuant to a sunset review. Accordingly, Commerce has far more discretion than it admits.

3. Extraordinary Circumstances

The SAA cautions, however, that the requirement that Commerce provide the Commission with net countervailable subsidy that is "likely to prevail" in the event of revocation is not to be construed as directing Commerce to calculate a "future net countervailable subsidy." The SAA reads as follows:

> In providing information to the Commission, the Administration does not intend that Commerce calculate future * * * net countervailable subsidies, because such an exercise would involve undue speculation * * *. Only under the most extraordinary circumstances should Commerce rely on * * * net countervailable subsidies other than those it calculated and published in its prior determinations.

SAA at 890–91.[19] *See also* 19 C.F.R. § 351.218(e)(2)(i) ("Even where the Department conducts a full sunset review, only under the most extraordinary circumstances will the Secretary rely on a CVD rate * * * other than those it calculated and published in its prior determinations * * *."). The implications of this limitation are not as broad as Commerce urges. This passage in the SAA regarding "future net countervailable subsidies" indicates that Commerce should not attempt to calculate a CVD rate based on subsidies not yet in existence. The final sentence directs Commerce not to consider subsidy allegations it has not yet passed on. It cannot be read as a limit on needed adjustments to an outstanding rate, because section 1675a(b)(1)(B) expressly requires consideration of program changes. The SAA's limitations on findings as to the future existence of subsidies or unreviewed subsidies say nothing about restricting Commerce's discretion to adjust the original CVD rate as envisioned by the general principles immediately preceding them. By adjusting an existing CVD rate, Commerce does not cease to rely on it. It does not abandon it for an entirely new subsidy calculation. In fact, in accordance with the statute, Commerce adjusted certain rates here because it apparently deemed some recurring subsidies terminated (i.e., the Structural Improvement Aids and the Zonal Border Area programs), or found non-recurring subsidies inapplicable to the classes of merchandise under review in this case (i.e., the Ruhr District Action program). Indeed, the SAA indicates that Congress contemplated that Commerce is to engage in some fact gathering when conducting a full sunset review. *See* discussion, *supra*, at Section I.A. Such fact gathering would be pointless if Commerce were prohibited from considering those facts in order to determine whether adjustments to the original CVD rate are warranted. Accordingly, Commerce is not restricted by the stat-

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[19] The regulations parallel the language of the SAA. Section 351.218(e)(2)(i) of the regulations reads as follows:

> Even where the Department conducts a full sunset review, only under the most extraordinary circumstances will the Secretary rely on a CVD rate * * * other than those it calculated and published in its prior determinations * * *.

19 C.F.R. § 351.218(e)(2)(i)

ute or the SAA from making adjustments to the original CVD rate in the absence of a separate subsequent determination.[20]

4. Policy Bulletin

Commerce seeks support from the Sunset Policy Bulletin for its refusal to make adjustments in the absence of an administrative review. The Sunset Policy Bulletin contains a non-exclusive list of examples of circumstances in which Commerce may or may not make adjustments to the original net countervailable rate. Sunset Policy Bulletin at § III.B.3. Example (g) indicates that "[w]here the Department has not conducted an administrative review of the order, or suspension agreement, as applicable, subsequent to the investigation, except as provided in paragraph III.C[21], the Department normally will not make adjustments to the net countervailable subsidy rate determined in the original investigation." *Id.* at § III.B.3.g. To the extent that Commerce interprets Example (g) as completely foreclosing any adjustments other than those specified in § 1675a(b)(2)(A) or (B) simply because no administrative review has been conducted, the court finds no support for such a restriction in the statute, the regulations or the SAA. In fact, the court finds that such an interpretation of Example (g) would directly conflict with the SAA and the statutory scheme, and is therefore impermissible. *See* 19 U.S.C. § 1675a(b)(1)(B) and, *supra*, discussion I.B.2 & 3. *Cf. Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372, 1380–84 (Fed. Cir. 2001) (according deference to Commerce's interpretation of statute where interpretation arising out of a "relatively formal administrative procedure" constituted "a permissible construction of the statute.").

5. Verification

Commerce explains that it rejected the information submitted by the Plaintiffs in part because of a "preference" for verified information. Commerce stated that it typically does not conduct investigations in sunset reviews, and only rarely conducts on-site verifications. Commerce further explained that given the "unusually stringent" time constraints, it would be "unreasonable and burdensome" to require Commerce to conduct an investigation as extensive as that of an administrative review. DOC Br. at 23. Commerce's arguments lack merit.

Commerce does not dispute that the information in the calculation memoranda and Preussag's questionnaire had been verified in the origi-

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[20] Of course, it does not follow from the principles described above that in all sunset reviews Commerce *must* make adjustments to the original CVD rate. Commerce has the discretion to decide when an adjustment would aid in reaching a more accurate determination of the net countervailable subsidy likely to prevail. *See Neenah Foundry Co. v. United States*, 142 F. Supp. 2d 1008 (Ct. Int'l Trade 2001) (citations omitted). The court in *Neenah Foundry* noted that the word "may" suggests even wider discretion than other provisions in the regulations which state that the agency "normally will" or "normally will not" change the rate in a given situation. *Id.* at 1026. The court found that Commerce did not abuse its discretion in not making an adjustment to reflect a more recent administrative review where there was a "rational connection between the facts found and the choices made in the agency's methodology for determining the net countervailable subsidy." *Id.* at 1027–28. In this case, Commerce's avoidance of fact finding based on its misapprehension of the scope of sunset review precludes the court from making a determination with respect to a "rational connection."

[21] Paragraph III.C parallels section 1675a(b)(2) of the statute and generally states that if the Department determines that "good cause" is shown, it will also consider (1) programs determined to provide countervailable subsidies in other investigations or reviews under certain circumstances, or (2) programs newly alleged to provide countervailable subsidies.

nal investigation. Rather, Commerce's concern seems to be that in a sunset review, it is impracticable to verify that no subsidies were given to companies other than Preussag under the CIG and/or IPA programs after the POI (1991), or that Preussag in fact received after this date only 0.6% of the total amount given.[22] This concern seems unwarranted, given that Defendant-Intervenors have not pointed to any evidence that subsidies were given under these programs after 1991 to any company other than Preussag, or that Preussag in fact received more than Plaintiffs allege. Defendant-Intervenors merely speculate that "[o]ther companies may have received more." Def.-Int. Br. at 17. Commerce is also apparently concerned that it would be unable to verify any of the additional facts that may be necessary to determine a CVD rate under current laws and methodologies described in Section II, *infra*. Commerce cannot justify its failure to consider Plaintiffs' arguments based on its conjecture that this information might be unavailable or otherwise incapable of being verified.

Commerce is correct that it is not obligated in all sunset reviews to verify factual information relied upon in making its final determination. According to the regulations, it is within Commerce's discretion to verify information prior to issuing the final results pursuant to sunset review, although once a determination to revoke is made, verification is mandatory. *See* 19 C.F.R. § 351.307 ("Prior to making a final determination in an investigation or issuing final results of review, the Secretary *may* verify relevant factual information. * * * [T]he Secretary *will* verify factual information upon which the Secretary relies in * * * a revocation under [19 U.S.C. § 1675(d)]." (emphasis added). *See also* 19 U.S.C § 1677m(i)(2) ("The administering authority shall verify all information relied upon in making * * * a revocation under section 1675(d).").[23] *Cf.* 19 U.S.C. § 1676m(i)(3) (requiring verification in an administrative review only if requested by an interested party, and, unless good cause is shown, if no verification was made during the two preceding administrative reviews).

The regulations further indicate that it is within Commerce's discretion to verify information it receives in a full sunset review if it determines that such verification is "needed." *See* 19 C.F.R. § 351.218(f)(2)(i) (Commerce "will verify factual information relied upon in making its final determination normally only in a full sunset review * * * and only where needed."). Although the regulations describe limited circum-

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[22] Commerce argues as follows: "Dillinger's assumption that the subsidy rate at issue would have fallen below *de minimis* by the end of the sunset reviews is flawed. In fact the opposite may be true. Given that Commerce allocates subsidies over sales, it is possible, for example, that the subsidy rates could have actually increased over the period between the original issuance of the orders and the sunset reviews, depending on sales value each year since 1993. [T]his is another reason why Commerce normally performs this type of analysis only in the context of an administrative review." DOC Br. at 24. Presumably, sales values since 1993 would be readily available to Commerce had it requested submissions regarding this information.

[23] Section 1677m(i)(2) does not distinguish between revocations under section 1675(d)(1) (revocations pursuant to administrative or changed circumstances review) and those under section 1675(d)(2) (revocations pursuant to sunset review). *See Final Rule*, 62 Fed. Reg. 27,296 at § 351.218.

stances in which Commerce will typically verify information,[24] Commerce does not contend that a party might be prejudiced if it chooses to conduct a verification when these circumstances are not present.

Even if Commerce were prohibited from conducting verification in a full sunset review, Commerce still must analyze the submitted evidence to determine the proper weight it should be given. *See Floral Trade Council v. United States*, 20 CIT 595, 601 (1996). The lack of an obligation to conduct verification in a sunset review does not relieve Commerce of its obligation to consider and weigh information submitted by the parties in support of arguments reasonably made as to why revocation would or would not be likely to continue or recur beyond the end of sunset review.

Accordingly, Commerce on remand must consider the evidence proffered by both parties and the Government of Germany.

II. Adjustments Pursuant to Changes in Law and Methodology

Plaintiffs claim that Commerce erred in failing to consider any changes in U.S. or international law occurring since the original investigation that affect the previously investigated subsidies. Plaintiffs contend that failure to consider these changes contravenes the purpose of a sunset review, i.e., determining the net countervailable subsidy that is likely to prevail if the countervailing duty order is revoked. Specifically, Plaintiffs assert that Commerce erred in not considering changes in law relating to: (1) a Commission of the European Communities decision putting limitations on aid to the steel industry;[25] (2) the passage of the Uruguay Round Agreements Act with provisions rendering certain subsidies non-actionable[26]; (3) a change in U.S. regulations governing con-

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[24] The regulation also indicates that "[t]he Department will conduct verification normally only if, in its preliminary results, the Department determines that [1] revocation of the order or termination of the suspended investigation, as applicable, is not likely to lead to continuation or recurrence of a countervailable subsidy or dumping * * * and [2] the Department's preliminary results are not based on countervailing duty rates or dumping margins, as applicable, determined in the investigation or subsequent reviews." 19 C.F.R. § 351.218(f)(2)(i).

[25] Commission Decision No. 2496/96/ECSC (Dec. 18, 1996) established Community rules for State aid to the steel industry. This decision specified that "any aid in any form whatsoever and whether specific or non-specific which Member States or their regional or local authorities might grant to their steel industries is prohibited pursuant to Article 4 (c) of the Treaty." The rules issued pursuant to this decision allow for an exemption regarding regional investment aid for disadvantaged regions in certain Member States, which has now been limited to Greece, provided that that the total aid does not exceed ECU 50 million and the aided investment does not lead to an increase in production capacity. All other regional investment aid is now prohibited. Previously, Art. 5 had allowed for exemptions for aid granted to steel undertakings located in the territory of the former German Democratic Republic provided that the aid is accompanied by a reduction in the overall production capacity of that territory.

[26] Article 8.2(b) of the WTO Subsidies Agreement contains the greenlight category "subsidies to disadvantaged regions." To qualify, the region must be considered "disadvantaged on the basis of neutral and objective criteria which in turn measure the level of economic development in the region." It is also required that measures of economic development be based on either per capita income and GDP (no disadvantaged region can exceed 85% of the national average) or unemployment rates (which must be 110% of the national rate) over a three year period. Finally, the criteria cannot favor certain regions beyond what is appropriate for the elimination or reduction of regional disparities within the framework of the regional policy.

Current section 1677(5B) of the statute parallels the Subsidies Agreement categories of noncountervailable subsidies. The statute reads in relevant part as follows: "[a] subsidy provided, pursuant to a general framework of regional development, to a person located in a disadvantaged region within a country shall be treated as non-countervailable, if it is not specific * * * within eligible regions" and if certain conditions are met. 19 U.S.C. § 1677 (5B)(C).

tingent liability interest-free loans[27]; and (4) a GATT dispute settlement panel decision regarding private bank debt forgiveness.[28] Plaintiffs also allege that Commerce should have taken into account the following changes in Commerce's methodologies regarding: (1) the calculation of "average useful life"; and (2) change-in-ownership.

A. Changes in Law

As discussed in Section I.B, *supra,* with respect to whether adjustments could be made to the original CVD rate in light of facts and arguments raised by the parties, Commerce determined that an administrative review, rather than a sunset review, was the appropriate context within which Plaintiffs could seek relief as to a change in the duty rate calculated in accordance with changes in applicable laws and regulations.[29] In the Sunset Determination, Commerce stated:

> [A]lthough the sunset segment is created by the WTO agreement and thus follows post-WTO provisions, laws, or regulations, we do not consider that it is appropriate for the Department to retroactively change its previous results (especially those of the original investigation) based on new provisions, laws, or regulations. If respondents had desired that post-WTO changes in the law regarding the identification and quantification of subsidies be taken into account, they could have requested an administrative review subsequent to changes in the applicable laws and regulations, but they did not. Therefore, we determine that there is no basis to reject the Department's earlier findings in an investigation due to subsequent changes in methodology because such changes do not invalidate the Department's findings under the prior methodology especially where, as here, there has been no administrative review.

Sunset Determination at cmt. 14.

As Commerce misapprehends the purpose and scope of a sunset review, its concerns regarding the consideration of changes in law are misplaced. Under a sunset review, Commerce is to determine as accurately as possible whether countervailable subsidies are likely to continue or recur. Sunset reviews are "inherently prospective." *See Ad Hoc Comm.*

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[27] The new section governing contingent liability interest-free loans is 19 C.F.R. § 351.505(d)(2), which reads as follows: "If, at any point in time, the Secretary determines that the event upon which repayment depends is not a viable contingency, the Secretary will treat the outstanding balance of the loan as a grant received in the year in which this condition manifests itself." Section 351.504 explains the application of this new provision: (a) Benefit. In the case of a grant, a benefit exists in the amount of the grant. (b) Time of receipt of benefit. In the case of a grant, the Secretary normally will consider a benefit as having been received on the date on which the firm received the grant. (c) Allocation of a grant to a particular time period * * *" In this case, the Secretary allocated the benefit from the SVK assistance to a time period of 15 years. Therefore, since the assistance would then have been paid to SVK in 1985, if the assistance given to SVK is considered a non-viable contingency it would not continue to provide benefits beyond the end of the sunset review. It is not clear whether there are sufficient facts for Commerce to determine if the contingency at issue is viable or not.

[28] In its substantive response, Dillinger urged Commerce to consider the findings of a GATT Dispute Settlement Panel. *See* Pl. App. Tab 3 at 4 (citing *United States—Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in France, Germany and the United Kingdom: Report of the Panel* ¶ 404 (Oct. 14, 1994)). Dillinger explained that the Panel had "determined that the debt forgiveness by private banks was not a subsidy and that the United States 'had acted inconsistently with Articles 1 and 4:2 of the Agreement when it treated the debt forgiveness as countervailable subsidies.'" *Id.*

[29] Administrative reviews conducted after January 1, 1995—the effective date of the Uruguay Round Agreements Act ("URAA"), Pub. L. No. 103-465, 108 Stat. 4809 (1994)—apply post-URAA law. *See FAG Kugelfischer Georg Schafer AG v. United States,* 131 F. Supp. 2d 104 (Ct. Int'l Trade 2001) (reviewing administrative review applying antidumping statute as amended, the where administrative review was initiated after December 31, 1994, even though original investigation pre-dated URAA).

of Domestic Uranium Producers v. United States, 162 F. Supp. 2d 649, 654 (Ct. Int'l Trade 2001) (likening ITC's sunset review to threat of material injury determination). *See also Matsushita Elec. Indus. Co. v. United States*, 750 F. 2d 927, 933 (Fed. Cir. 1984) (finding that given "inherently predictive" nature of review investigation, "Commission must assess, based on currently available evidence and on logical assumptions and extrapolations flowing from that evidence, the likely effect of revocation of the antidumping order on the behavior of the importers.").[30] By requesting that Commerce consider changes affecting the original CVD rate, Plaintiffs are not asking Commerce to "reject" its findings under the original investigation, or to change "retroactively" the results of the original or subsequent investigations. A revocation order issued pursuant to sunset review would apply to imports entered after the effective date of such order. This is not a retroactive application.

As a result, this case does not present the type of retroactivity problems at issue in *Melex USA v. United States*, 19 CIT 1130, 899 F. Supp. 632 (1995). There, the court held that assessment of antidumping duties for entries that took place before revocation of the injury determination was authorized under the antidumping statute, but that methodologies under the amended statute should not have been retroactively applied to prior entries. In that case, the Department of Treasury made a finding of dumping in 1975. *Melex*, 19 CIT at 1131, 899 F. Supp. at 634. Later, the Commission conducted a changed circumstances review, and on June 11, 1980, determined that the domestic industry would not be threatened with material injury if the antidumping order were revoked. *Id.* Commerce subsequently issued a notice of revocation, but specified that unappraised entries made prior to June 11, 1980 were unaffected. *Id.* In 1991, the exporters requested an administrative review regarding entries made prior to June 10, 1980. With respect to these entries, Commerce determined that the exporters sold the merchandise at less-than-fair-value. *Melex*, 19 CIT at 1132, 899 F. Supp. at 635. The exporters appealed, claiming that because the antidumping duty order was revoked in 1980, Commerce could not assess duties on the pre-1980 entries. *Melex*, 19 CIT at 1133, 899 F. Supp. at 636. The court rejected this argument, holding that "a revocation of a determination of injury is prospective in that it does not revoke the determination of injuries for entries prior to the effective date of the revocation." *Id.* Thus, the court allowed for a review of the pre-1980 unliquidated entries, notwithstanding the 1980 revocation order. Nevertheless, the court found that Commerce erred in applying current law in the 1992 administrative review of the pre-1980 entries. The court reasoned that "the application of the 1979 and 1984 amendments to entries made prior to the effective dates of those amendments would be the retroactive application of those amendments which is not clearly required by statutory language, legislative history or administrative practice." *Melex*, 19 CIT at 1138, 899 F.

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[30] Although these sunset review cases involve the role of the Commission, there is no reason why the prospective nature of sunset review should not hold true for reviews by Commerce.

Supp. at 639. In this case, Plaintiffs are not seeking application of the current legal regime to imports already entered into the U.S. to obtain an adjustment of duties already paid. In this case, the likelihood determination involves whether subsidies would be likely to continue or recur, thereby having an effect on imports entered after the effective date of the potential revocation order.

The statute directs Commerce to consider "any change in the program" that is likely to affect the original CVD rate. 19 U.S.C. § 1675a(b)(1)(B). Although the statute leaves undefined the term "change in the program," the SAA indicates that Commerce is to consider whether the subsidy programs have been "continued, modified, or eliminated." SAA at 888. The SAA thus contemplates that pursuant to a sunset review, Commerce is to consider changes in foreign law that affect the program. By its nature, then, a sunset review is designed to account for changes in law that have a bearing on whether countervailable subsidies will continue or recur. A sunset review does not provide for recalculation of the original CVD rate such that duties on entered imports that were subject to the order must be revised retroactively. It stands to reason, however, that how Commerce views a particular subsidy under current practices and regulations will bear on its determination of the likelihood that the subsidy will continue or recur beyond the end of sunset review.

In addition, the court finds no support for Commerce's tacit imposition of a requirement that an interested party participating in a sunset review must have first requested and completed an administrative review.[31] Administrative reviews may not be available for several reasons. For example, under 19 C.F.R. § 351.213(d)(3), an administrative review may be rescinded based on a finding that "during the period covered by review, there were no entries, exports, or sales of the subject merchandise." In this case, Commerce does not dispute that none of the German producers, except Dillinger, made any shipments of subject merchandise since the issuance of countervailing duty orders in 1993, or that Dillinger's last shipment in 1995 pre-dated the changes in law at issue in this case. Commerce suggests that the Plaintiffs could have made a token shipment to the United States in order to avoid rescission under 19 C.F.R. § 351.213(d)(3). Nothing in the statute requires such machinations in order to obtain a meaningful sunset review.

Thus, Commerce is not barred from considering changes in the foreign or U.S. laws described above, or from considering facts underlying these changes, which may or may not have taken place after the imposition of the original CVD order. Commerce must consider and give a reasoned explanation in response to material and reasonable arguments as to why a change in U.S. or foreign law would or would not have an impact on the likelihood of continuance or recurrence of the subsidies under re-

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[31] This is not to say, however, that a sunset review must be as extensive as an administrative review. Although in some cases a sunset review may be more restrictive than an administrative review, Defendant Intervenors have not demonstrated any prejudice that would arise from the imposition of an adjusted CVD rate pursuant to the more thorough review that is warranted in this case.

view. *See* SAA, at 892, *reprinted in* 1994 U.S.C.C.A.N. at 4216 ("the agencies must specifically reference in their determinations factors and arguments that are material and relevant, or must provide a discussion or explanation in the determination that renders evident the agency's treatment of a factor or argument."). If Commerce chooses to exercise its discretion not to apply these changes in law, or decide that the facts do not warrant an adjustment, it must state its reasons in its likelihood determination. It is insufficient to decline consideration of any change in law subsequent to the original determination simply based on the supposed limitation on the scope of a sunset review, as such considerations are inherent in making the likelihood determination required in the sunset review. Commerce will therefore determine on remand whether, if at all, adjustments are warranted based on the points raised by the Plaintiffs in their substantive response and subsequent submissions. The court takes no position on the cited changes as these matters are not ripe for review.

B. Current Methodologies

Commerce concedes that it applies current law in administrative reviews, but that an exception should be made for sunset reviews. There is no reason for making such a distinction. Under the historical and statutory notes to 19 U.S.C. § 1671, the 1994 URAA amendments "shall take effect on [January 1, 1995], and apply with respect to * * * reviews initiated under section 1675," which includes administrative, changed circumstances and sunset reviews. Furthermore, there is no indication in these notes that Commerce or the Commission should distinguish between review of an order entered pursuant to an investigation that took place after the URAA amendments, and those that took place before. The general principle seems to be, therefore, that current law governs any review under section 1675 irrespective of the date of issuance of the order under review. It follows from this principle that Commerce is not barred from applying current methodologies in a sunset review. Indeed, Defendant-Intervenors concede that "if [Commerce] must consider subsequent changes in law in a sunset review, then [it] must consider its new regulations as well." Def.-Int. Br. at 33.

1. AUL Calculation Methodology

Commerce maintains that even if it were appropriate to consider its current methodologies in a sunset review, it would not change its average useful life (AUL) calculation from the original investigation. Commerce asserts that according to its past practice, where a company's AUL previously has been calculated in an investigation, it will use the same AUL calculation in a subsequent review notwithstanding any change in methodology, provided the same subsidies are again being investigated, and in the absence of any new evidence. Plaintiffs argued in the sunset proceedings that Commerce should not continue to apply a 15-year allocation period from the IRS Class Life Depreciation Tables rather than the more specific 11-year period contained in the German depreciation schedule. Plaintiffs urged Commerce to reevaluate the

15-year allocation period in light of the following: (1) Commerce's current regulations require it to use an allocation period based upon a country-wide depreciation rate if that rate differs from the IRS tables by more than one year;[32] and (2) findings in an investigation that the applicable allocation period from the German depreciation schedule for productive assets in the German steel industry was found to be 11-years. *See Steel Wire Rod,* 62 Fed. Reg. at 54,991.

Administrative practice does not detract from the general principle described above. Commerce has applied methodologies in administrative reviews that were instituted in accordance with the court's decisions issued subsequent to the original investigation. Commerce has also refrained from doing so where circumstances of a case warrant, such as when the application of current law would not lead to more accurate results. For example, the investigations in *Certain Hot-Rolled Lead and Bismuth Carbon Steel Products from the United Kingdom,* 63 Fed. Reg. 18,367, 18,369 (Dep't Comm. 1998) (final adm. review), stand in contrast to those in *Certain Cut-to-Length Carbon-Quality Steel Plate from France,* 64 Fed. Reg. 73,277 (Dep't Comm. 1999) (final adm. review). In the former case, Commerce applied an allocation methodology based on company-specific average useful life data in accordance with *British Steel v. United States,* 929 F. Supp. 426, 439 (Ct. Int'l Trade 1996). Commerce specifically rejected the respondent's request to apply the method for calculating average useful life according to the IRS tables as had been done in the original investigation. Commerce chose the rate derived under the current methodology, reasoning that applying different allocation periods for the same subsidies in two different proceedings involving the same company would generate significant inconsistencies. *Id.*

In the latter case, by contrast, Commerce continued to allocate subsidies that had been countervailed in prior cases according to the company-specific AUL assigned to the same subsidies in those prior cases based on the POI. The respondent had requested that Commerce apply the current methodology of calculating the company's AUL in each year that a subsidy is provided. 64 Fed. Reg. at 73,293 cmt. 13. Commerce rejected this argument, reasoning that recalculating the AUL under the current methodology would be "extremely burdensome" and not necessarily accurate where the company-specific AUL proposed by the respondents derived from an on-going investigation. *Id.* In contrast, Commerce found that the AUL from the prior investigation was "reasonable and accurate as possible without being burdensome." *Id.* At the

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[32] Under 19 C.F.R. § 351.524(d)(2), an interested party may overcome the presumption that the average useful life (AUL) is to be calculated according to the IRS depreciation tables by establishing that (1) the tables do not "reasonably reflect" the company-specific or country-specific rate, and (2) the difference is "significant." 19 C.F.R. § 351.524(d)(2) reads in relevant part as follows:

> The Secretary will presume the allocation period for non-recurring subsidies to be the AUL of renewable physical assets for the industry concerned as listed in the Internal Revenue Service's ("IRS") 1977 Class Life Asset Depreciation Range System * * *. The presumption will apply unless a party claims and establishes that the IRS tables do not reasonably reflect the company-specific AUL or the country-wide AUL for the industry under investigation, subject to the requirement * * * that the difference between the company-specific AUL or country-wide AUL for the industry under investigation and the AUL in the IRS tables is significant. If this is the case, the Secretary will use company-specific or country-wide AULs to allocate non-recurring benefits over time.

same time, Commerce applied its new discount policy under 19 C.F.R. § 351.524 because the discount rate derived therein was "more realistic" and would result in a "better measure of the subsidy." *Id.* Thus, under its own practices, Commerce may choose or not choose to apply current law in a review as circumstances warrant. In this case, Commerce has made no findings pursuant to sunset review with respect to whether application of current methodologies as applied in *Steel Wire Rod* would result in a more accurate CVD rate.

In the Sunset Determination, Commerce refused to apply the methodology and findings in *Steel Wire Rod* because "in this review we are dealing with different companies and a different set of subsidies." Sunset Determination at cmt. 7, n.32. On appeal, Commerce reiterates this statement without making factual findings relating to Plaintiffs' assertions that (1) *Steel Wire Rod* involved the SVK assistance at issue in this case, and (2) Commerce had found in the Preliminary Sunset Determination that "DHS and Dillinger remained, for all intents and purposes, the same entities as the pre-privatization Saarstahl/DHS." *Preliminary Sunset Determination* at I.10–13. As it is not the court's role to make findings in this regard, Commerce must do so on remand.

2. Change-in-Ownership Methodology

Plaintiffs argue that Commerce erred in continuing to apply its change-in-ownership methodology found "illegal" by the U.S. Court of Appeals for the Federal Circuit and the WTO Dispute Settlement Body.[33] Plaintiffs contend that had Commerce applied its current change-in-ownership methodology in this case, the country-wide subsidy rate in the *Cut-to-Length Plate* proceeding would have fallen from 14.84% to 0.21%. Commerce determined that it was "not appropriate" to reach the privatization issue for purposes of sunset review. Commerce explained that:

> Both the Appellate Body and CAFC decisions were issued relatively late in this proceeding. A sunset review is not the appropriate proceeding in which to examine a complicated privatization transaction and to consider a new privatization methodology. In light of the complexity and fact-intensive nature of this issue, it is imperative that the issues be fully developed on the record.

Commerce argues that the sunset review schedule does not allow it time to analyze the complex factual issues that would be revisited by an analysis of a change in law. Commerce ignores the statutory provision

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[33] With respect to cut-to-length plate, the countervailing duty rate determined in the original investigation was 14.84%. Of this amount, 14.63% related to subsidies applied to Dillinger (the "SVK assistance") using Commerce's original change-in-ownership methodology. Since the issuance of the Final Determination, a WTO Appellate Body Report and a decision of the U.S. Court of Appeals for the Federal Circuit found that Commerce's change-in-ownership methodology was not in accordance with the statute. *See United States—Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Orginating in the United Kingdom*, WT/DS138/AB/R (*"UK Lead Bar"*), and *Delverde, SrL v. United States*, 202 F.3d 1360, 1367 (Fed. Cir. Feb. 2, 2000), *reh'g granted in part and denied in part* (June 20, 2000) *(Delverde III)* (vacating decision by Court of International Trade and instructing to remand for Commerce to determine based on "facts and circumstances" of asset purchase whether respondent received an indirect subsidy). The Federal Circuit rejected Commerce's practice of applying an irrebuttable presumption that the benefit of subsidies provided to one company "passes through" to the purchasers of that company regardless of whether the sale represented an arm's length transaction consistent with commercial considerations. *Id.* at 1368.

that it may seek an extension of time for "extraordinarily complicated" sunset reviews. *See* 19 U.S.C. § 1675(c)(5)(C). *See also* 19 C.F.R. § 351.218 (f)(3)(ii) ("If the Secretary determines that a full sunset review is extraordinarily complicated under section 751(c)(5)(C) of the Act, the Secretary may extend the period for issuing final results by not more than 90 days."). Indeed, the statute specifically provides that Commerce may treat a review as "extraordinarily complicated" if it is a review of a transition order. *See* 19 U.S.C. § 1675(c)(5)(C)(v). In any event, as Plaintiffs proposed that a change-in-ownership methodology consistent with current law be applied to facts already on the record, it is not apparent to the court why Commerce was unable to make any necessary adjustments within the time requirement of the statute.[34] If Commerce deemed the issues raised by the Plaintiffs to warrant a more thorough analysis or more extensive fact gathering, it could have sought additional time, but did not do so. Commerce cannot justify its decision not to address the issues raised by the parties simply on the basis that the issues arise in the context of a sunset review and the stringent time limits involved, especially when Commerce does not avail itself of the mechanisms provided for by its own regulations.

3. Evidence relating to Methodologies

Plaintiffs also argue that Commerce abused its discretion in removing from the record the German producers' March 14 and March 17 submissions. Plaintiffs make the following contentions: (1) Commerce acted inconsistently in not rejecting the domestic producers' November 9, 1999, and March 16, 2000 post-rebuttal comments, and allowing the domestic producers to submit "new factual information" (namely, copies of questionnaire responses from the original investigation) as late as April 28, 2000, *see* P.R. Doc. 763, Pl. App. Tab 12; and (2) Commerce had already accepted the submissions, as is evidenced by Commerce's references in the Preliminary Sunset Determination to the issues raised therein. Commerce responds that there were no inconsistencies in its rejection of submissions where: (1) its return of the March 14 submission rendered the domestic producers' March 16, 2000 response "moot and irrelevant" and it did not consider it for the purposes of the Sunset Determination; and (2) the domestic producers' accepted submission dated November 9, 1999, related to its adequacy determination and was therefore timely in fact. DOC Br. at 42–43. Commerce also explained in the Sunset Determination that in fact it did not rely on the March submissions in the Preliminary Sunset Determination.[35]

There is no statutory "deadline" for Commerce to reject a submission in a sunset review. Nevertheless, once Commerce has accepted a submis-

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[34] It is not clear what methodology Commerce would apply. *See Allegheny Ludlum Corp. v. United States*, No. 99–09–00566, (Slip Op. 02–01) 2002 WL 15690 at *9 (Ct. Int'l Trade Jan 4, 2002) (rejecting Commerce's change-in-ownership methodology); *Acciai Speciali Terni S.p.A. v. United States*, No. 99–06–00364 (Slip Op. 02–10) (Ct. Int'l Trade Feb 1, 2002) (same).

[35] Commerce stated that it "discussed certain issues in its preliminary determination because either the issues were raised in interested parties' substantive responses, rebuttal comments, or the Department obtained the relevant information on its own." Sunset Determination at cmt. 6.

sion, in certain cases it may be improper and/or prejudicial for it to remove the submission from the record. Commerce is presumed to consider the evidence on the record in making its determinations. At the time of the preliminary sunset determination in this case, Commerce had not yet rejected the German producer's submission. Thus, the court must presume that it considered the German producers' March 14, 2000, and March 17, 2000 submissions as well as the domestic producers' March 16 submission in making its preliminary sunset determination. The court further finds an inexplicable inconsistency in Commerce's subsequent rejection of the German producers' submission while failing to do the same with the domestic producers' March 16, 2000, and April 28, 2000 submissions.[36] The argument that the unequal treatment of the parties concerns a moot issue is a *post hoc* argument and does not explain Commerce's behavior. In evaluating the changes in methodology described above, Commerce shall consider the evidence submitted by the parties relating thereto.

CONCLUSION

Accordingly, Commerce's determination pursuant to sunset review is remanded. Commerce cannot act irrationally and arbitrarily. It cannot accept Domestic Parties' "late" submissions and reject those of respondents. It cannot make some adjustments to an original CVD rate and then state it will not consider evidence of other adjustments because all adjustments are barred. It cannot avoid applying changes in the law because it is burdensome or inconvenient. Certainly, Commerce has a difficult task in deciding whether subsidies will continue or recur. It can streamline its procedures to some degree, but it must conduct meaningful sunset reviews. It has great discretion, but it must comply with the statute and explain its decisions. It cannot erect barriers simply to avoid considering complicated problems.

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[36] Commerce is correct, however, that the domestic producers' November 9, 1999 submission related to its adequacy determination and was therefore timely. *See* Sunset Procedures at § 351.309(e)(ii) (allowing 70 days from the notice of initiation to comment on adequacy determinations).

SECOND NOTICE OF ERRATA TO AMENDMENTS TO THE RULES OF THE UNITED STATES COURT OF INTERNATIONAL TRADE

On January 18, 2002, the Office of the Clerk issued a Notice of Court Approval of Amendments (approved by the Court on December 18, 2001) to the Rules of the United States Court of International Trade. A review of those amendments revealed some inadvertent errors. A Notice of Errata was issued on February 5, 2002.

This Second Notice relates to another inadvertent error which has been found in the amendment to Rule 4 as follows:

> In error, amended (new) language was added to Rule 4(k)(2) rather than to Rule 4(j)(2). Subsection (k)(2) should remain unchanged.

A corrected version of amended Rule 4 now appears at its hyperlink on the home page of USCIT web site under "Notice of Court Approval of Amendments to the Rules (1/18/02)."

Copies of this Second Errata, the first Errata (2/5/02) and the original Notice (1/18/02) have been transmitted to the following sources for publication:

Bureau of National Affairs, Inc.
Fuglei & Associates
Gould Publications, Inc.
International Business Reports
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LEO M. GORDON,
Clerk of Court.

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C02/19 2/12/02 Aquilino, J.	Widex Hearing Aid Co.	91–11–00833	9021.90.40 4.2%	9817.00.96 As articles specially designed or adapted for the use of the blind	Agreed statement of facts	New York Parts and accessories for hearing aids
C02/20 2/12/02 Aquilino, J.	Widex Hearing Aid Co.	92–05–00355	9021.90.40 4.2%	9817.00.96 As articles specially designed or adapted for the use of the blind	Agreed statement of facts	New York Parts and accessories for hearing aids
C02/21 2/12/02 Aquilino, J.	Widex Hearing Aid Co.	92–10–00673	9021.90.40 4.2%	9817.00.96 As articles specially designed or adapted for the use of the blind	Agreed statement of facts	New York Parts and accessories for hearing aids
C02/22 2/12/02 Aquilino, J.	Widex Hearing Aid Co.	93–4–00220	9021.90.40 4.2%	9817.00.96 As articles specially designed or adapted for the use of the blind	Agreed statement of facts	New York Parts and accessories for hearing aids
C02/23 2/12/02 Aquilino, J.	Widex Hearing Aid Co.	93–11–00773	9021.90.40 4.2%	9817.00.96 As articles specially designed or adapted for the use of the blind	Agreed statement of facts	New York Parts and accessories for hearing aids
C02/24 2/12/02 Aquilino, J.	Widex Hearing Aid Co.	94–5–00287	9021.90.40 4.2%	9817.00.96 As articles specially designed or adapted for the use of the blind	Agreed statement of facts	New York Parts and accessories for hearing aids
C02/25 2/12/02 Aquilino, J.	Widex Hearing Aid Co.	95–5–00719	9021.90.40 4.2%	9817.00.96 As articles specially designed or adapted for the use of the blind	Agreed statement of facts	New York Parts and accessories for hearing aids

C02/26 2/12/02 Aquilino, J.	Widex Hearing Aid Co.	95–11–01453	9021.90.40 4.2%	9817.00.96 As articles specially designed or adapted for the use of the blind	Agreed statement of facts	New York Parts and accessories for hearing aids
C02/27 2/20/02 Restani, J.	Cymbolic Sciences, Ltd.	96–7–01668	CA9017.20.90 At the NAFTA duty rate of 2.3% or CA9017.20.90 At the NAFTA duty of 1.7%	9006.10.00 3% or at the NAFTA rate of 1.2% or 0.9% 9006.59.40 4% or at the NAFTA rate of 1.6% or 1.2%	Agreed statement of facts	Hidalgo Persian limes
C02/28 2/22/02 Pogue, J.	Casio Phonemate, Inc.	98–11–03152	8517.11.0000, 8517.19.8050, 8520.20.0040 1.6%, 6.4%, or 1.1%	A8517.11.0000, A8517.19.8050 or A8520.20.0040 Free of duty	Uniden America Corp. *v.* United States, S.O. 00–139 (2002)	Los Angeles Cordless telephones, etc.

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